HEALTHY COMPETITION: FEDERALISM AND ENVIRONMENTAL IMPACT ASSESSMENT IN CANADA – 1985-1995

by

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I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

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Abstract

The effect of federalism on the development of public policy is a widely debated topic. In terms of environmental policy, this issue assumes greater importance because of the lack of clarity in the constitutional division of powers. It is the purpose of this research to examine environmental impact assessment (EIA) – one of the higher-profile aspects of environmental policy – in order to establish how intergovernmental relations in Canada have affected policy and process development in this area. It is hypothesized that unilateral federal action in this policy area contributes to a corresponding increase in the stringency of provincial EIA processes. To test this, a two-step analysis is adopted: first analyzing developments at both the federal and provincial levels from 1985-1995 – a period which witnessed exceptionally high levels of public concern for the environment and increased federal involvement in EIA – and second discussing key events and agreements which affected intergovernmental relations and determining whether these related to those developments identified. This research finds that greater federal involvement in EIA was a catalyst for some positive reform at the provincial level, although this result varied significantly between the provinces examined. Based on the evidence gathered, it is concluded that some form of intergovernmental collaboration and competition both have a place in the development of EIA policy and that neither should be pursued as an end in itself.

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Acronyms

Federal Government

CEAAct	1995 *Canadian Environmental Assessment Act*
CEAAgency	Canadian Environmental Assessment Agency
DFO	Department of Fisheries and Oceans
EARPGO	1984 Environmental Assessment Review Process Guidelines Order
FEARO	Federal Environmental Assessment Review Office
SCESD	House of Commons Standing Committee on the Environment and Sustainable Development

British Columbia

BCEAA	1995 *Environmental Assessment Act*
EMA	1981 *Environmental Management Act*
MDAA	1991 *Mine Development Assessment Act*
MDRP	1984 Mine Development Review Process
MPRP	1990 Major Project Review Process
UCA	1980 *Utilities Commission Act*

Alberta

EPEA	1993 *Environmental Protection and Enhancement Act*
LSRA	1973 *Land Surface and Reclamation Act*

Saskatchewan

SBDA	Souris Basin Development Authority
SDOE	Saskatchewan Department of the Environment
SEAA	1980 *Environmental Assessment Act*

Manitoba

MEA	1987 *Environment Act*

Ontario

OEAA	1975 *Environmental Assessment Act*

Intergovernmental Organizations/Agreements

CCME	Canadian Council of Ministers of the Environment
CWA	1996 Canada-Wide Accord on Environmental Harmonization
EMFA	Environmental Management Framework Agreement
JBNQA	James Bay Northern Quebec Agreement
SAEA	Sub-Agreement on Environmental Assessment

United States

EPA	Environmental Protection Agency
NEPA	1969 *National Environmental Policy Act*

Terminology

CEA	Cumulative Effects Assessment
EA	Environmental Assessment
EIA	Environmental Impact Assessment
SEA	Strategic Environmental Assessment

Chapter 1: Introduction

1.1 Research Rationale

Environmental protection has gradually evolved into a significant and pressing issue over the last 30 years. Parson (2000) describes it as "…the most prominent new domain of politics and public policy to arise over the last few decades, in Canada and internationally" (p. S123). Concern over environmental degradation has been fuelled by events such as the publishing of Rachel Carson's *Silent Spring* in 1962 and the sinking of the *Exxon Valdez* in 1989 (Harrison, 1996). Internationally, perhaps the most well-known initiative was the publishing of the 1987 report *Our Common Future* by the World Commission on Environment and Development – commonly known as the Brundtland Commission – which recommended adoption of the practice of sustainable development as a means to integrate environmental protection and economic development. Canadian officials at both the federal and provincial levels have generally spoken very favourably about this recommendation (Rabe, 1997).

Canadian environmental legislation has largely developed in fits and starts, with a flurry of legislation in the early 1970s and a similar level of activity around 1990 (Skogstad, 1996). The first major piece of environmental legislation in North America during these periods was, however, the American 1969 *National Environmental Policy Act* (NEPA) that established the Environmental Protection Agency (EPA). The EPA was given extensive powers to enforce federal standards, which led to the analogy that it served as a "…gorilla in the closet" that the states could call upon to ensure industry compliance (Tobin, 1992). The NEPA also introduced North America's first Environmental Assessment Review Process. Canada introduced such a process at the federal level in 1973

and, by 1984, it had become the Environmental Assessment Review Process Guidelines Order (EARPGO). At this point, it was considered by the federal government to be a non-binding process applied at its discretion to proposed projects it felt warranted such attention (Doern & Donway, 1994). Around 1990, however, a series of court rulings interpreted the EARPGO as a binding document requiring federal Departments to conduct environmental assessments (EAs) on a wide variety of proposals previously overlooked. At the same time, opinion polls were detecting unprecedented levels of public concern for environmental degradation (Harrison, 1996).

Over the next few years, reviews of federal and provincial environmental impact assessment (EIA) processes were conducted across Canada and several new pieces of legislation were put into place. As Chapter 4 will show, each of the five western provinces – from British Columbia to Ontario – initiated some form of review of their EIA process around 1990 and made changes which increased the stringency of these processes. The results of these reviews, however, varied significantly. Saskatchewan and Manitoba undertook limited reforms, the former through departmental guidelines and the latter through legislative amendments. Ontario also did relatively little. The federal government, British Columbia and Alberta, meanwhile, passed new legislation which dramatically improved the stringency of their EIA processes. Despite the differences in the degree of reforms, however, the almost simultaneous nature of many of these reforms begs the question of whether they were interrelated.

It is contended here that there was such an interrelation and that due attention must be paid to Canada's federal structure. Not only is jurisdiction over the environment sharply divided between the federal and provincial governments, but Canada is often divided over

what federalism should mean. Bakvis and Skogstad (2002), for example, see the very legitimacy of the Canadian federal system as challenged by its failure to adequately accommodate Quebec within itself. Meanwhile, others argue the merits of centralization versus decentralization as solutions to problems such as ensuring national standards while allowing enough room for policy experimentation. Canadian public policy, therefore, cannot be developed in a vacuum, but must be considered alongside issues such as jurisdiction and with the broader political framework of the time in mind.

1.2 Purpose and Objectives

While many authors have dealt with the effects of federalism on the development of environmental policy, it was felt that a detailed evaluation of the role of intergovernmental interaction in the development of federal and provincial EIA policy during and after the wave of reforms around 1990 would permit clarification of this interrelationship. The aim of this research is therefore to identify this role. It is hypothesized that the uncharacteristic degree of unilateral federal action around this time contributed to an increase in stringency of those provincial EIA processes examined. The objectives of this research are threefold:

1) To describe the constitutional division of powers as they relate to environmental policy and to discuss patterns in intergovernmental relations in this area.
2) To develop an evaluative framework that will not only assess the changes made in EIA processes, but will also allow for identification of the effects of intergovernmental interaction on these processes.
3) To identify lessons from this analysis for some of the broader debates concerning Canadian federalism and environmental policy.

1.3 Thesis Organization

The following chapters present the context, methodology, evaluation, findings and conclusions of this research. Chapter 2 provides a review of the relevant literature surrounding federalism and environmental policy. Chapter 3 presents the research approach and methodology, including the development of the evaluative framework, as well as data collection. Chapter 4 comprises the first step in the evaluative framework through the development of criteria to identify increases in stringency of the EIA processes examined from 1985, when public concern over the environment first began to rise beyond normal levels, to 1995, when the Canadian Environmental Assessment Act (CEAAct) was proclaimed. It also seeks commonalities in the specific improvements undertaken across jurisdictions. Chapter 5 completes the evaluation by examining major events and initiatives in federal-provincial relations during and after this period. These include: court cases dealing with three prominent projects – the Rafferty and Alameda dams in Saskatchewan, the Oldman River dam in Alberta and the James Bay II hydroelectric project in Quebec; the development and amendment of the CEAAct; and the various stages of the intergovernmental environmental harmonization initiative that began in the mid-1990s. Bilateral relations between each of the provinces selected and the federal government are also examined in an attempt to better identify and explain any differences between provinces. In addition, Chapter 5 presents public opinion data from around 1990 to help determine whether changes in the EIA processes examined can be adequately explained as independent responses to the same pressure. Finally, Chapter 6 draws conclusions about the different ways increased federal involvement has affected the provincial processes, the

different approaches and priorities both orders of government bring to EIA and how these reflect on important issues in Canadian federalism.

Chapter 2: Literature Review

This chapter will provide a review of the relevant literature in order to better understand the debates surrounding the effect of federalism on environmental policy. Initially, it will be necessary to discuss the constitutional division of powers in Canada as it applies to the environment. Such an overview will reveal that the provinces are accorded a clearer responsibility, but that the federal government retains several important sources of authority which have been bolstered by court rulings over the last 20 years. Next, the subject of federalism itself will be addressed in order to demonstrate some of the different perceptions of what federalism means, what its purpose is and what are its strengths and weaknesses. These questions are directly related to two broad debates on how divided jurisdiction affects the development of environmental policy. The first debate involves whether effective policy reform and implementation is best achieved through intergovernmental collaboration or competition, while the second debate concerns which level of government is best suited to provide stringent environmental policy. It will be seen that the hypothesis presented in chapter 1 is based largely in the first of these debates, but that research relating to this hypothesis have implications for the second debate. Different arguments relevant to both debates will be presented with the goal that the subsequent research may reinforce the validity of some of these positions.

2.1 The Constitution

Not surprisingly, the Fathers of Confederation did not directly address the issue of authority over environmental policy. Thus, not only is this government authority based on

other elements of constitutional jurisdiction (Benidickson, 1997), but it is also quickly apparent that:

> …the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty… (*Friends of the Oldman River v Canada [1992]*)

Despite this uncertainty, an overview of the constitutional division of powers reveals that the provinces have a much clearer and more direct responsibility for environmental protection.

The backbone of provincial power in environmental policy is found in the inextricable link between environmental protection and natural resources. To begin with, the *Constitution Act, 1867* gives the provinces control over "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada" [s.107], although Alberta and Saskatchewan did not gain control over their own natural resources until 1930. This clause has also allowed for significant rights of access to other resources such as water found on those lands (Harrison 1996). This situation is in stark contrast to that of the United States, where the federal government owns much of the land under the public lands clause (Kincaid 1996). Furthermore, in 1982 Section 92A reaffirmed this ownership by stating that provinces could exclusively make laws in relation to exploration for non-renewable natural resources [1a] and development, conservation and management of forestry resources [1b] and "sites and facilities in the province for the generation and production of electrical energy" [1c]. It should be noted, however, that non-renewable resources apart from the two explicitly mentioned were deliberately excluded from this amendment due to federal concern that a more general commitment might impact federal jurisdiction over areas such as fish and agriculture. Nor, significantly, did the provinces gain a greater

constitutional role in international trade of resources or limit the application of the Peace, Order and Good Government (POGG) clause (Meekison & Romanow, 1985).

Provincial ability to legislate in the area of environmental protection also comes from several other clauses in Section 92. The provinces are responsible for "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" [s.92(5)], "Municipal Institutions" [s.92(8)], "Local Works and Undertakings" [s.92(10)], "Property and Civil Rights in the Province" [s.92(13)] and "Generally all Matters of a merely local or private Nature in the Province" [s.92[16]). It is important to note here that these powers are limited to matters *within* the province. As mentioned above, one of the main arguments of advocates of more federal involvement in environmental policy is the transboundary nature of environmental problems. Stevenson (1985), for example, pointedly notes that "[F]ish are notorious for their disregard of provincial or even national boundaries" (p. 83). This statement could also equally apply to resources such as water and air. Finally, the provinces are responsible for enforcement in these areas through "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section" [s.92(15)].

The federal government, by contrast, has, at least at face value, a much less clear constitutional base on which to act in the area of environmental protection. It is responsible for "Navigation and Shipping" [s.91(10)], federal works and undertakings [ss.91(29) & 92(10)], "Indians, and lands reserved for the Indians" [s.91(24)] and a variety of "Public Works and Property of each Province" including canals, harbours, lighthouses and railways [s.108 & 3rd schedule]. In addition, the federal government is responsible for "Sea Coast

and Inland Fisheries" [s.91(12)], a power which has been perhaps the most commonly used justification for federal involvement. The Supreme Court in the 1980s displayed a willingness to accept encroachment on provincial jurisdiction under the *Fisheries Act* as long as the legislation made a clear link between the regulation and the prevention of harm to fisheries (Benidickson, 1997). This is important because, as with almost all aspects of environmental policy, the fishery is not free of constitutional overlap. As Harrison (1996) notes, while Ottawa retains regulatory power over the fishery, the provinces, as the owners of many of the beds of the water bodies, have also been recognized to have ownership rights over the actual fish.

Beyond these areas, the federal government is accorded four other more general powers that have become important for Canadian environmental policy. It shall be seen that the evolution of these powers indicates a noticeable willingness on the part of Canada's senior courts to interpret the federal environmental role quite broadly. In the 1992 *Oldman River* case, La Forest J. affirmed the legitimate use of such general powers by writing that environmental regulation must be achieved "…by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns" (*Friends of the Oldman River Society v Canada)*. First amongst these powers is "The Regulation of Trade and Commerce" [s.91(2)]. In 1994 the Supreme Court ruled in the case of *Quebec (Attorney General) v Canada (National Energy Board)* that the National Energy Board, which had issued an export permit to Hydro-Quebec for the proposed second phase of the James Bay hydroelectric development under the federal *Environmental Assessment and Review Process Guidelines Order* (EARPGO), could attach conditions to this approval stating that the construction of future generating plants would

require environmental assessments. In so doing, it rejected the argument made by the Quebec Attorney General and Hydro-Quebec that the federal assessment should be limited exclusively to matters dealing with the actual physical exporting of the power, such as the power lines: "If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects." This clause is, however, limited by the fact that it has been historically interpreted to apply to international and *inter*provincial trade, but not to *intra*provincial trade (Benidickson, 1997). Nor can international agreements – trade or otherwise – be used to infringe unnecessarily on provincial jurisdiction. As explained in the ruling of the Judicial Committee of the Privy Council in the 1937 *Labour Conventions* case: "[T]he Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth…" (*Attorney-General for Canada v Attorney-General for Ontario, 1937*). There has been speculation that the federal government, if it so desired, might be able to override this latter point by using the second of its general powers: the POGG clause.

The POGG clause has become an important source of legitimacy for federal environmental initiatives due to the development of its 'national concern' doctrine. This doctrine was fleshed out by Le Dain J. in *R v Crown Zellerbach Canada Ltd [1988]*:

> 2 The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
> 3 For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
> 4 In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a

> provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

In this case, the majority held that Section 4(1) of the federal *Ocean Dumping Act*, which prohibits dumping of substances at sea without a permit, was justifiable as marine pollution could be classified as a 'national concern.' An interesting comment that illustrates the potentially controversial nature of the doctrine is found in the dissent by La Forest J.:

> All physical activities have some environmental impact … To allocate the broad subject-matter of environmental control to the federal government … would effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution.

Since this ruling, speculation about what might constitute a 'national concern' has been widespread. An interesting case would be if the constitutionality of the Kyoto Protocol were challenged, since air pollution would seem to stand a good chance of meeting the standard of "singleness, distinctiveness and indivisibility." Analysts tend to agree that the *Crown Zellerbach* ruling would support an increased federal role in environmental policy (Hanebury, 1991; Jaeger, 1993). How the federal government has responded to this will be discussed following the remaining two broad federal powers: criminal law and the spending power.

Federal responsibility over criminal law [s.91(27)] is the most recent example of judicial willingness to interpret Ottawa's powers broadly in relation to the environment. In a 5-4 decision, the Supreme Court ruled in the 1997 case of *R v Hydro-Quebec* that the criminal law power was an acceptable tool for environmental protection. La Forest J., writing for the majority, states: "[S]tewardship of the environment is a fundamental value of our society … The Criminal law must be able to keep pace with and protect our emerging values." By contrast, the concerns of the dissenting opinion, delivered by Lamer C.J. and Iacobucci J. again emphasize raise jurisdictional issues: "…wholesale regulatory

authority of the type envisaged … is, in our view, inconsistent with the shared nature of jurisdiction over the environment."

The final federal responsibility that must be considered is also one of the oldest: the spending power. While this is not specifically defined in the constitution, it has been one of the more commonly used tools by the federal government to exercise influence over a variety of policy areas (Brooks, 1997). In terms of environmental policy, the spending power has been used mainly through Environment Canada's monitoring and enforcement activities. As Harrison (1996) notes, this marks a significant difference when compared to the federal government in the United States due to the lack of federal funding of provincial environmental programs. The American federal government, which gained the right to attach regulatory conditions to grants in 1937, has often used its spending power to influence environmental policy at the state level (Kincaid, 1996). Why a similar course of action has not been followed in Canada leads into a discussion of how the Canadian governments have operated in a policy area with such an ambiguous division of powers.

2.2 Federalism and Public Policy

It is impossible to analyze the development of environmental policy in Canada without a discussion of the institutional 'rules of the game.' These rules provide the setting for the formulation of public policy and have increasingly been attributed with an independent ability to shape this formulation. In Canada, one of the most important institutions is federalism and the constitutional division of powers between the two orders of government. There are, however, many different interpretations of federalism's effects. Black and Cairns (1966) envision a series of *dirigiste* provincial governments which use their expanding bureaucratic capacity to push for more and more devolution, while Fletcher

and Wallace (1985) see federal-provincial conflict as limiting the development of public policy. Part of the explanation for these differences must come from the different assumptions authors make about what federalism means. It is argued that such a divergence in assumptions is noticeable between the federal and provincial governments and their supporters in environmental policy and that it contributes to differences in policy priorities. Some may, for instance, place tremendous value on achieving some form of national standard, while others may prioritize flexibility and experimentation above all else.

Perhaps most fundamentally, there is divergence concerning the purpose of federalism. Vipond (1991), for example, identifies two competing traditions in Canada: one which emphasizes individual liberty and typically looks to the central government to protect this liberty; and the other which focuses more on substate communities and sees regional governments as their protectors. The former is illustrated well by Trudeau (1968), who writes about the relationship between individual Canadians and the central government that: "…the whole of the citizenry must be made to feel that it is only within the framework of the federal state that their language, culture, institutions, sacred traditions, and standard of living can be protected from external attack and internal strife" (p. 193). The latter is evident when Gagnon and Laforest (1993) state:

> …[F]or federalism to be legitimate, the imposition of instrumentalities that conflict with the interests of the federating nations must be avoided. The original compact (real or understood) made between the nations of Canada was based on the understanding that the agreement would allow for diverse means of continued development and the establishment of the necessary instruments to strengthen their respective national aspirations within the newly formed political entity (p. 484).

On a practical level, Smiley's (1977) model of inter- and intrastate federalism is a good representation of the two, while Cairns (1992) demonstrates the tension between the two over the issue of the Canadian Charter of Rights and Freedoms. Norrie, Simeon and

Krasnick (1986) propose three different interpretations of Canadian federalism: one which emphasizes the need for national standards in areas ranging from the economy to individual rights; one which sees Canada as the creation of 'two founding nations' that need to be recognized either through means such as official bilingualism or asymmetry; and one which argues for provincial diversity and a strong provincial role in national policy.

Where one stands on the purpose of federalism is sure to influence the importance one attaches to federalism's strengths and weaknesses. The ability of the various governments to experiment in policy development is one of the most commonly cited strengths. In the Canadian case, perhaps the best-known example is the introduction of universal hospital and medical insurance in Saskatchewan and its subsequent diffusion across the country (Noel, 1999). A second major strength is the protection of minorities from oppression (Whitaker, 1983). The protection offered here is not the kind of enshrinement of individual rights offered in the Charter, but rather a fragmentation of authority so that territorially-based minorities become majorities within that territory. As stated by Norrie *et al* (1986):

> [A] central question for the design of federations is not so much whether the majority should rule but rather which majority should rule on any given question. Ideally, the Constitution should say that for a certain set of purposes the community is the country… but for another set of purposes, the relevant communities are provincial and it is there that majority rule should operate. A claim that either kind of majority is inherently superior is hostile to federalism (p. 19).

Two major issues often raised can be identified as weaknesses of federalism. The first is based on the desirability of simplicity and accountability in government. A sufficiently complex division of powers risks making it unclear to citizens who is responsible for what (Stevenson, 1985). This may allow for buck-passing between governments when the public is looking for someone to blame. The second weakness

involves the possibility that there are: "…ineradicable tendencies to conflict between the federal vision of a society and economy and ten competing provincial visions" that must be managed (Cairns, 1988, p. 167). In Canada, the practice of executive federalism and its often-criticized secretive decision-making process has developed partially to contain these tendencies (Brock, 1995).

Given the extent of jurisdictional overlap, Canadian environmental policy has historically been surprisingly free of intergovernmental conflict (Dwivedi & Woodrow, 1989). Thus, it does not fit comfortably with Stevenson's (1985) picture of a Canadian federation "…characterized by conflict and controversy" (p. 71), nor with Cairns' (1988) statement that federal and provincial governments are "…aggressive actors steadily extending their tentacles of control, regulation and manipulation into society…" (p. 151). Instead, environmental policy has largely been one of provincial control uncontested by the federal government, which remains mostly content to play a supporting role through research and the development of a few national standards in consultation with the provinces (Harrison, 1994). Before discussing why the federal government would willingly cede authority to the provinces, however, it is valuable to explore several factors that might lead to *neither* level of government acting in the manner predicted by the *dirigiste* model.

There are an exceptional number of barriers – both institutional and societal – to the development of environmental policy in Canada. Harrison (1996) states that "Environmental protection typically involves diffuse benefits and concentrated costs…" (p. 5). What is meant by this is that, while the benefits of environmental regulation would be diffused across society as a whole, the costs will largely be borne by a small group of regulated industries. Not only is it likely that this small group will be more sensitive to

attempts to make regulations more stringent, but the owners of these regulated industries are often in a position to "…offer politicians more than just votes…" (Harrison, 1996, p. 14). Representatives of these industries, on the other hand, argue that their concern is more with avoiding unnecessary duplication and delay than with avoiding regulation (Bérubé & Cusson, 2002). Rabe (1999), however, sees a pattern where the provincial governments avoid implementing anything beyond symbolic measures because of a fear of aggravating existing relationships with industry.

This reluctance to change the way things are done also extends to intragovernmental relationships. Winfield (1994) refers to environmental policy as "the ultimate horizontal issue" because of its necessary infringement on many other policy fields and requirement that other Ministries or Departments reassess traditional methods of economic development (pp. 129-130). The Minister of the Environment then is often set against many members of the Cabinet who resent this perceived intrusion. Occasionally, a Minister of the Environment has sought allies outside of their Cabinet, as indicated by the extraordinary case of Quebec's Pierre Paradis, who in 1990 publicly went against his government by calling for a more forceful federal environmental assessment of phase two of the James Bay project (*Montreal Gazette*, 23/11/90). The reluctance shown by Sheila Copps, federal Minister of the Environment in 1995, over the Environmental Management Framework Agreement, is another example of the figurative isolation in which an Environment Minister can find themselves (Fafard, 1997). Both of these examples shall be revisited again in Chapter 5.

The main societal influence on environmental policy is the nature of public concern about the environment. Harrison (1996) points out the distinction between what she calls

"trends in public concern" and "trends in salience of environmental issues" (p. 57). The former is measured by closed-ended questions which ask about environmental problems, such as 'Do you consider pollution to be an important issue?' The latter is measured through open-ended questions which rank the environment against other issues, such as 'What are the top three problems facing Canada today?' Harrison finds that, when explicitly asked about the environment, a high percentage will express concern. However, there have really only been two periods in Canadian history when the environment ranked high on the latter measure: in the late 1960s and the late 1980s. If one is to judge which measure is more important based on when governments have acted in the environmental field, then certainly the latter measure stands out. As Parson (2000) states:

> Citizen concern for the environment has been persistently mixed, labile, and ambiguous, only infrequently reaching and holding the intensity required to provoke major policy change. Moreover, citizens' declared concern for the environment often exceeds the evidence of concern discernible in their major consumption choices such as residence and transport. Consequently, governments most often treat environmental protection as a secondary priority… (p. 139).

In other words, citizens may pay lip service to environmental protection most of the time, but it takes a significant event to make them take it seriously. Good examples would include the exposure of the harmful effects of DDT in the mid-1960s and the *Exxon Valdez* oil spill in 1989.

These trends in public opinion have an added importance for Canadian environmental interest groups according to Hoberg (1997) who argues that, in the American system, the added emphasis on 'legalism' – using the courts – allows interest groups another way to influence the government agenda. In Canada, by contrast, "You can call a press conference, and that's about it" (p. 355), although the courts have taken an increasingly activist role over the past 15 years. Moreover, the horizontal fragmentation

between executive and legislature within the American federal government has been attributed by some not only with leading to upward pressure on environmental standards during times of high public attention due to competition between the two branches, but also with impeding the rolling back of these standards when public attention wanes (Hoberg, 1997; Harrison, 2000b). One of the big questions in an analysis of federalism and environmental policy in Canada is whether this country's system of vertical fragmentation between federal and provincial governments has had the same effect.

Such a question serves as a good introduction to the first of two debates over the effect of federalism and public policy that are especially relevant to an analysis of Canadian environmental policy. First, there is a debate over the ideal model of intergovernmental interaction in a policy area where it is increasingly accepted that both orders of government must be involved. Norrie *et al* (1986) present two possible models of interaction: collaboration and competition. Advocates of the former focus on the avoidance of unnecessary costs. These costs are not only the perceived economic costs of overlap but also the political costs that may arise if the public becomes tired of government infighting. An excellent example of this is the first Mulroney government's promise to 'renew federalism' through a more collaborative intergovernmental approach (Brooks, 1997). Simeon (2000) characterizes this approach as "collaborative federalism," meaning:

> …an intergovernmental process through which national policies are achieved not by the federal government acting alone, nor by its coercing provincial action through its spending power, but rather by some or all of the 11 governments and territories acting collectively (p.238).

Courchene (1996) regards this as an almost inevitable consequence of the significant budget cuts of the 1990s. His proposed rebalancing of the federation, although geared towards economic and social policy, is significant for environmental policy as well. Ideas

such as the replacement of 'federal' standards with 'national' standards – that is, standards agreed upon cooperatively rather than imposed from Ottawa – have already been put into operation in the area of environmental policy, as the later discussion of the Canadian Council of Ministers of the Environment (CCME) will show. Dwivedi and Woodrow (1989) emphasize the ability of federal-provincial bureaucratic task forces and committees to overlook "jurisdictional wrangling" in favour of dividing responsibilities according to which government is best suited to each task. An important point to be made here is that support for collaboration can often also come from outside governments. Harrison (1994) describes how industry is often vehemently opposed to having to comply with two different sets of environmental regulations.

Those who advocate competition between governments are much less concerned with the cost of overlap; or, perhaps more appropriately, much more willing to bear any cost incurred. Certainly the Royal Commission on the Economic Union and Development Prospects for Canada (1985) felt some costs were the unavoidable consequences of maintaining a balanced federation:

> Co-operation between the two orders of government cannot be the essence of federalism or the dominant criterion which should inform our evaluation of federalism's performance: carried to such extremes, the stress on co-operation destroys federalism … each government has an autonomous capacity to act, and the exercise of such authority is not only proper, but a necessary consequence of federalism (vol.1, p.68).

Instead of avoiding duplication, then, the "dominant criterion" for supporters of competition is the assumed increase in government responsiveness, since citizens who do not have their interests met by one government can turn to the other (Norrie *et al*, 1986). Brown (1994) presents the argument that one could perceive no overlap even in areas where both the federal and provincial governments are active if one believes them to be

fulfilling different functions and Brander (1985) sees the possibility of competition creating upward pressure on policy development.

It should also be added that there is often a suspicion amongst supporters of competition that efforts at collaboration are merely efforts at *de facto* decentralization. Breton (1985), for instance, argues:

> Co-operative federalism, because it proscribes unilateral action, is therefore a disguised ploy to shackle the federal government, to prevent it from addressing the problems it alone can resolve and is constitutionally responsible for resolving. Indeed, condemning federal unilateralism is condemning the federal government for acting constitutionally! (p.493)

Cameron and Simeon (2002) characterize adherents of "collaborative federalism" as "mostly provincial governments and their supporters" (p.49) and see efforts at environmental harmonization over the last decade as involving a significant degree of delegation of federal authority. This argument can be slightly altered to illustrate another criticism of collaborative federalism; that the federal government is willingly 'shackling' itself in order to avoid acting in areas of environmental policy. Harrison (1996) has presented what is perhaps the most developed argument along these lines.

Apart from the reasons for governments not to wish to act in the area of environmental policy which have already been described, two other barriers to action may be attributed exclusively to Canada's federal government. The first one – the constitutional division of powers and the indirect nature of federal constitutional responsibility for environmental protection – has been discussed. The second is well-described by Lucas (1986) as Canada's "political constitution" (p. 35). This is the idea that the federal government must take care not to needlessly offend provincial sensitivities through perceived encroachment into provincial areas of responsibility.

Over the past 30 years, then, Ottawa has actively sought to avoid conflict over environmental policy. As a policy area which catches the public eye only infrequently, it is generally agreed that the federal government has proved willing to make concessions here in order to focus on more pressing goals (Lucas, 1986; Skogstad, 1996). There are several good examples of this. After provincial complaints that the Environmental Protection Service (EPS) division of Environment Canada was being too aggressive in enforcing the *Fisheries Act* in 1978, EPS was ordered to back off (Doern & Conway, 1994). As one former senior official said: "The message got through. If EPS officials had tried rigorous enforcement, they would have got their fingers rapped" (p. 219). This resulted in nominal federal setting of base standards without any means to enforce them. The 1971 *Clean Air Act*, unflatteringly called "…a hollow shell of the US *Clean Air Act*" by Harrison (2000b, p. 57), is another good example. Its goal was to establish national air quality objectives. However, unlike in the US, no deadlines were set. Nor was there a national enforcement regime. Ottawa could only set emissions standards if the provincial government chose to adopt the federal air quality objectives. This approach left much to be desired, as broad discrepancies in enforcement across provinces emerged and Canada had, in general, "a weak enforcement regime everywhere" (Skogstad, 1996, p. 111). A third example is the early attitude of the Mulroney government, which had come to power in 1984 on a promise to 'renew federalism.' Suzanne Blais-Grenier was Mulroney's first Environment Minister and instructed her officials to get along with the provinces (Doern & Conway, 1994, p. 181). Along with a 14% cut in the Department's budget, this left Environment Canada severely weakened its ability to act.

The fact that exceptional circumstances seem to be required to spur the federal government to action is disappointing to those who see value in intergovernmental competition; in this case, that federal unilateralism, or even the threat of federal unilateralism, may serve as a catalyst for provincial action. This argument is based on provincial hypersensitivity to federal action in the environmental arena. In Quebec, for instance, federal environmental action is often opposed by the provincial government as part of the larger struggle for increased autonomy (Brown, 1994). In Alberta, meanwhile, the unbreakable link between environment and natural resources is a paramount concern. Skogstad notes that, in Alberta, "environmental policy is energy policy," (p. 109), while the Mulroney government's 1990 Green Plan was heavily criticized after the Deputy Minister of Environment Canada had supposedly referred to it as the "son of NEP" (Dabbs, 1990). This view necessarily conflicts with the 'collaborative federalism' model in which national standards are determined by the federal and provincial governments, or occasionally by only the latter. These authors, however, generally see the environmental benefit of the initiative as outweighing the 'cost' of intergovernmental disharmony. Thompson (1980) notes an increase in provincial activity following the 1970 *Canada Water Act*, while Doern and Conway (1994) attribute the development of provincial environmental impact assessment procedures in the late 1970s to anticipated federal action. In an analysis of the environmental harmonization initiative of the mid-1990s, Winfield (2002) further warns of the risks of rejecting competition outright:

> Good intergovernmental relations were seen to become an end in themselves, necessary to demonstrate the potential for reform of the federation. However, the results of the harmonization experience to date suggest that good intergovernmental relations do not necessarily equal good substantive policy outcomes. The race to the bottom that has been occurring among provinces over the past few years is continuing … [T]he earlier era of competitive federalism seemed to produce far better results for the protection of the environment. (p.135).

Such a statement introduces the second major debate concerning federalism and environmental policy: which level of government is more likely to implement stringent policies and legislation? This question immediately becomes caught up in the overarching struggle between supporters of centralization and decentralization. It should be noted here that these terms are used to mean a shift of policy control either towards the national government or towards the subnational governments and that neither term is intended to indicate support for the outright abdication of one order of government from a policy field. Proponents of the former emphasize the federal government's ability to control interprovincial 'spillovers,' as concluded by Nemetz (1986). They also favour centralized policy-making to take advantage of economies of scale in certain policy areas, and support the ability of the federal government to resist regionally dominant interests and to prevent the much-debated possibility of a 'race to the bottom' (Harrison, 2000b). An interesting example of this latter point is the case of the move to control acidic emissions in the 1970s and 1980s. When asked whether he would toughen emissions standards on INCO Limited – a major employer in Sudbury – then-Premier of Ontario Bill Davis stated: "I am not prepared to have the government create an economic problem for the city of Sudbury. We can't do this in isolation" (quoted in Cataldo, 1990, p.45). It should be noted, however, that a 'race to the bottom' in environmental policy is quite a controversial idea with studies differing on if or when it occurs (Field & Olewiler, 1994; Markusen *et al*, 1995).

A final, and very interesting, argument that has been gaining currency is the idea that the federal government needs the ability to honour its international obligations. In the 1950s, Canada had found itself in the embarrassing position of abstaining during a draft reading of the *Universal Declaration of Human Rights* before the United Nations, partly

because Ottawa did not want to appear to be encroaching on provincial jurisdiction (Schabas, 1998). This issue became much more significant during the Free Trade negotiations, when the provinces demanded but did not receive 'full participation' in the negotiations (Delagran, 1992). If the Kyoto Protocol is an indication of a trend towards a more global style of environmental governance, then this issue will only become more pressing.

Advocates of decentralization tend to focus on the benefits of diversity. Thus, a decentralized federation can not only better accommodate different ethnic or linguistic groups who have their own regionally distinct preferences (Kincaid, 1996), but it can also experiment with policy innovation which can then be judged, at the most basic level, by citizens "voting with one's feet" (Brander, 1985, p.37). Vogel (1995) argues that such innovation, if undertaken by an influential enough jurisdiction, can actually lead to the opposite of the 'race to the bottom' – a phenomenon he refers to as the "California effect" (p.6), where other subnational or national actors are pressured to raise their regulatory standards. Another argument which has been previously mentioned but is worth revisiting is that of efficiency. As will become apparent, almost any argument in favour of decentralization is at least partially based on the assumption that there is needless overlap and duplication of effort, resulting in a great deal of inefficiency (Lindquist, 1999). One might suggest that this overlap could equally be remedied by wide-scale *centralization*, but, in the context of Canadian environmental policy at least, the dialogue of inefficiency – and the pressing need to remedy it - is used almost exclusively by the provincial governments and decentralists.

The seriousness of the problem of overlap is, not surprisingly, an extremely contentious issue. As illustrated by Brown (1994), two reports, commissioned respectively by the governments of Quebec in 1978 and Alberta in 1992, discover a significant degree of overlap and attribute to it a high degree of inefficiency, while a study conducted by the Federal Treasury Board in 1991 finds that what overlap there is is managed fairly well. Perhaps the most insightful analysis of this situation comes from Meekison (1999), who states that "Disputes about overlap or duplication are inherently differences over the limits of jurisdiction" (p.69).

2.3 Conclusion

It is with these two debates in mind – collaboration versus competition and centralization versus decentralization – that the development of Canadian environmental impact assessment policy will be considered. This research will focus on the possibility that federal unilateralism in the area of environmental impact assessment has led at least partially to a corresponding increase in the level of stringency of provincial environmental impact assessment legislation and policy. To do so, it is necessary to examine a period when the federal government was active in this policy area. Environmental impact assessment is a useful area for this study because of its relatively high public profile as well as the wide coverage of issues that an environmental assessment demands. It is hoped that the results will cast some light on the validity of the arguments presented above in respect to both broad debates concerning federalism and environmental policy.

Chapter 3: Methodology

The following chapter outlines the approach and methods used to conduct this research. The main components include an overview of the evaluative framework and a description of data sources. Additionally, a brief description of jurisdictional selection criteria is included.

3.1 Research Approach

This research adopted a historical analysis of the evolution of EIA processes at both the federal and provincial levels in order to compare and contrast the changes at both levels over a given period of time. The decade from 1985 to 1995 was the obvious choice given the number of reform processes initiated in this time. These ten years also offered two unique factors that could be seen as catalysts for greater intergovernmental interaction: first, that public concern for the environment became exceptionally high by 1987 before returning to more normal levels by 1993; and second, that a series of court rulings effectively forced the federal government into a larger role in EIA. Within this time-frame, the EIA processes of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and the federal government were examined. The four western provinces were chosen because they had signed bilateral agreements with the federal government under the 1996 Canada-Wide Accord on Environmental Harmonization (CWA). It was felt that the presence of these bilateral agreements indicated a deliberate attempt by the governments involved to come to terms with the increased federal involvement of the early 1990s. While an examination of the harmonization initiative required a discussion of events after 1995, it was felt that such an examination provided the opportunity to better highlight the consequences of the

legislative and policy developments discussed. Ontario was also added to the analysis despite the fact that it does not have a bilateral agreement with the federal government (although one is currently in draft form) for its status as the third 'have' province in Canada. It was hoped that the inclusion of Ontario would make any connection between greater provincial capacity to manage an EIA process and heightened intergovernmental tension more obvious.

It is worth elaborating on the decision not to include Quebec in this analysis. Indeed, at first glance this would seem an illogical decision given the argument that fear of federal intervention in provincial jurisdiction provokes policy reforms. Its longstanding calls for greater provincial autonomy seem to make Quebec an ideal source of evidence for such a contention. The decision was based on the fact that Quebec did not participate in most of the intergovernmental initiatives of the time. It was the only Canadian jurisdiction not to sign onto the CWA and had no bilateral agreement with the federal government (although the Charest provincial government has very recently signed such an agreement). Instead, Quebec continued to reject the idea that the federal government was a partner with significant responsibilities in EIA, even after the series of court cases in the late 1980s and early 1990s affirmed such a role. It was felt that this different strategy would limit opportunities to examine the impacts of intergovernmental interaction.

Before the harmonization agreements could be discussed, however, it was necessary to determine what exactly occurred in terms of EIA reform from 1985 to 1995. Step one of the analysis, therefore, required the development of a framework to evaluate the degree of stringency of a jurisdiction's EIA process. Since significant debate surrounds the issue of what qualities are necessary for an effective process, cases where a comprehensive list of

such qualities was developed served as guidelines for the development of the seven factors used to assess stringency in this research. The major such works this framework was based on were those of Gibson (1993) and Doyle and Sadler (1996). Aboriginal involvement was not included amongst these seven factors, but, because of its specific relevance to EIA in Canada, was noted for those processes where explicit provision for such involvement was made. In each case, a jurisdiction's process was assessed for each of these factors according to criteria drawn from the literature. The various reforms that occurred throughout the decade - whether they be the development of policy guidelines, amendments to existing legislation or the introduction of new legislation - were also evaluated to create an idea of whether there had been an increase in stringency and where this increase occurred. Table 3.1 provides a simple example of this by examining the evolving requirement for the consideration of alternatives under the Alberta EIA process.

Table 3.1 EIA Processes in Alberta: 1985-1995

	1973 *Land Surface Conservation and Reclamantion Act*	1993 *Environmental Protection and Enhancement Act*
(3) Alternatives	○ 8(3)	● 49(h)

Legend

● Requirement to examine alternatives to project (including need for project)
○ Requirement to examine alternative methods of implementing project

It should be noted that the symbols, which are displayed in the legend in order of decreasing stringency, mean different things in each category. Where it was unclear where a process fell on this scale, a combination of two symbols was used.

In relation to the type of reforms made, this research accorded greater importance to changes in legislation than to changes in policy. The latter was often guidelines developed by the Department or Ministry of the Environment listing the information required in an

EA. As such, they certainly had the capability to alter the stringency level of the federal or provincial process. However, a legislative requirement – either within the actual Act or in an accompanying regulation – seemed to guarantee more consistency in application and clearer ties to offence and enforcement provisions. Where applicable, then, mention was made of the relevant guideline but the evaluation of stringency was based more on the legislation and its regulations.

Step two of the analysis was aimed at clarifying the impact of federalism on EIA policy in the chosen jurisdictions. To do this, the court cases concerning the Rafferty-Alameda dams, the Oldman River dam and the James Bay II hydroelectric project were examined to help understand the reasons for greater federal involvement in EIA in the 1990s and to identify key areas that were seen as in need of reform at the time. Two types of consequences of this involvement were then sought: changes in federal and provincial attitudes at the multilateral level – meaning changes in terms of attitude towards intergovernmental agreements – and changes in the individual provincial EIA processes that could be related to federal reforms. Commonalities between the provincial responses were obviously emphasized, but it was also deemed important to identify where the provincial positions diverged. Similarly, the federal and provincial positions were also contrasted. Finally, as a possible counter-argument to the hypothesis, public opinion data was analyzed to determine whether those reforms undertaken during this period could be convincingly attributed solely to increased public concern. The research questions behind the overall framework are listed in Table 3.2.

Table 3.2: Research Questions

Broad Question	*Sub-Questions*
Was there a widespread movement towards EIA reform in Canada from 1985 to 1995?	• Which jurisdictions had a more stringent EIA process in 1995 than a decade earlier? • Were there specific areas of the EIA process that received attention from many or all of the chosen jurisdictions? • Were the majority of EIA reforms initiated when public concern was trending upward or at its peak? • Were any reforms initiated when public concern was trending downward or after it had returned to normal levels?
Was there an increased federal presence in EIA during this period?	• Did the court cases around 1990 result in a change in the intergovernmental method of addressing EAs where both orders of government were involved? • What were the federal and provincial responses to this change?
Can an increased federal presence in EIA be considered an important factor in provincial reforms during this period?	• Was there a noticeable linking on the part of the provinces between increased stringency in EIA processes and a more limited federal role? • Was there variation in responses across the provinces?

3.2 Data Sources

Sources used differed significantly between the two broad research questions presented above. In determining the changes in EIA processes, the legislation or policies themselves were examined, along with relevant amendments or regulations. Where possible, this was supplemented through Departmental or Ministerial guidelines. Relevant literature was used to help devise appropriate criteria upon which to base an evaluation as well as appropriate determinants of stringency. Literature was also used to verify the accuracy of certain facts, but the ultimate assessment of stringency was done independently. Data on public opinion trends was taken almost exclusively from Gallup Canada polls conducted between 1987 and 1992.

Determining the impact of intergovernmental interaction on these reforms as well as the subsequent movement towards harmonization required a quite different set of evidence. The goal in this section was to examine a sufficient amount of evidence to be able to map out the evolution of intergovernmental relations in EIA since approximately 1990. It was recognized that there were, if effect, two different levels at which impacts might be evident: the political and the practical. Researching the former involved examining documentation surrounding relatively high-profile events, such as the construction of the Rafferty-Alameda dams or the five-year review of the CEAAct. Sources used included intergovernmental agreements, House of Commons committee hearings, court cases, provincial/territorial responses to proposed federal legislation, annual reports from the Canadian Council of Ministers of the Environment, newspaper articles and academic literature. This level of analysis served as an excellent reminder that environmental issues can only often be fully understood in the context of a jurisdiction's larger political agenda because of its links to such factors as natural resource development.

Information at the practical level was gathered mainly through closer attention to the individual jurisdictions' EIA processes. The goal here was not only to gather more information from the perspective of the actual environmental assessment agencies, but also to gain a better understanding of specific details in the evolution of the processes. This involved seven interviews with federal and provincial officials: one official from CEAAgency headquarters in Ottawa; a regional CEAAgency official in Edmonton; and one official from each of the selected provinces. Interviews were conducted by telephone and lasted between 45 minutes and two hours. Four officials were Director-level; two were Managers; and one chose to remain anonymous. While the interview process introduced

the unavoidable problem of quotation selection bias, it was seen as an important means of understanding intergovernmental interaction in EIA as well as a way of clarifying the causal links between this interaction and policy outcomes. This information was supplemented, where possible, by committee reports, annual Departmental or Ministerial reports and academic literature. The practical level of analysis allowed for a much better understanding of the way EIA processes actually work in practice and made clear some important similarities and differences between the attitudes and concerns of the chosen jurisdictions.

Chapter 4: Evaluating Changes in Stringency of Canadian Environmental Impact Assessment Legislation

This chapter serves as the first step of the evaluative framework introduced in the preceding chapter. As such, the goal will be to identify and assess the significance of changes in stringency to the federal and provincial EIA processes from 1985-1995. Section 4.1 begins by presenting seven criteria for a stringent EIA process based on relevant literature. Section 4.2 applies these criteria to relevant legislation and policy to each of the chosen jurisdictions. Changes in legislation throughout the decade are contrasted in order to identify specific areas of increasing or decreasing stringency. Section 4.3 concludes the chapter by commenting on the discernible patterns in process reform. It is argued that there was an overall movement towards increasing stringency in EIA processes at both the federal and provincial levels. The most obvious common type of reform is measures taken to ensure adequate consideration of transboundary effects in an EA, but other areas that received attention in multiple jurisdictions were increasing public involvement and a greater commitment to sustainability. This research also indicates a wide disparity between the degree of reforms across the examined jurisdictions. Saskatchewan, Manitoba and Ontario undertook relatively few reforms and therefore witnessed small increases in the stringency of their processes. By contrast, the federal government, British Columbia and Alberta undertook major legislative reforms that greatly enhanced the stringency of their respective processes.

4.1 Environmental Impact Assessment Theory

EIA is a unique element of environmental policy. Instead of establishing clear regulations concerning, for example, the emission of toxic substances, EIA serves as "…a vehicle for incorporating environmental considerations, along with conventional technical, financial and political considerations, in decisionmaking" (Gibson, 1993, p. 12). Its goal, as defined by Lawrence (2003), is to "... determine[e] and manag[e] the potential impacts of proposed human actions and their alternatives on the environment" (p. 7). How best to achieve this is a subject of significant controversy due to the obvious difficulty of providing not only a good analysis of the current environmental situation but also attempting to judge the severity of the possible impacts of the proposed activity. Nevertheless, since the emergence of EIA in the 1969 NEPA in the United States, some sort of agreement has gradually emerged over what the desirable qualities of EIA legislation are. This has made it possible for some authors to seek to compare and contrast different EIA methods. While each of these qualities shall be introduced below, the broader framework is largely based upon the work of Gibson (1993) and Doyle and Sadler (1996).

(1) Commitment to Sustainability

"Sustainable development" remains a loaded term. While the World Commission on Environment and Development (1987) defined it as "…development which meets the needs of the present without compromising the ability of future generations to meet their own needs" (p. 43), it remains debatable what this means in practical terms or even whether completely sustainable development – where there is no long-term degradation to the environment - is possible. A commitment to sustainability is, nevertheless, an important component in assessing the stringency of EIA legislation. While one's interpretation of a

jurisdiction's success in meeting this standard will obviously vary depending on one's definition of sustainability, Sadler (1996) offers perhaps the most realistic indicator: whether environmental goals are considered simultaneously with other elements such as economic and social goals. This indicator can be interpreted as having two elements. First, as will become apparent, one of the major criticisms of EIA processes in the 1980s and early 1990s was that they were often undertaken belatedly after a significant amount of time and money had been devoted to a project, making it highly unlikely that a project would be stopped. Second, it is increasingly seen as important that legislation ensure a proper scope for EIAs. While this must be balanced against the need for an EIA process that is not so massive as to be unnecessarily obstructive, a broad definition of environmental effects which requires consideration of environmental, social, biophysical and other factors has come to be seen as an asset to EIA legislation (Sadar, 1996).

A second major element of a commitment to sustainability is the need to address cumulative effects. While this is once again a debated concept, Rees (1995) identifies two core characteristics: first, a cumulative effects assessment (CEA) looks at the impacts of one factor or agent over time; and second, a CEA considers the impacts of other activities occurring in the same area. Spaling and Smit (1995), meanwhile, identify three types of accumulation which a CEA should cover: temporal accumulation, which occurs when activities are undertaken too close together in time to allow the area affected to recover; spatial accumulation, which occurs when multiple activities are physically too close together than the distance required to offset some or all effects; and activity accumulation, which occurs when one activity is repeated many times. As with a jurisdiction's definition of environmental effects, there is a need for proper scoping of a CEA to prevent it from

becoming unmanageable. However, it seems reasonable to expect that an explicit commitment to CEA would be present in stringent EIA legislation.

(2) Coverage

A second important measurement of stringency lies in what exactly is subject to an EA under the legislation. While EIA initially focused largely on physical works themselves, the realization that an EA's effectiveness could be seriously compromised if it was not applied early in the process has led to more emphasis on its application in the planning stage. The ideal would be strategic environmental assessment (SEA), in which a consideration of environmental impacts and alternatives to proposals is done at the policy level, making it less costly to alter or cancel the project or activity (Noble, 2002). In practice, however, SEA has run up against many problems, one of which is that policymakers are often reluctant to provide the necessary amount of transparency to ensure a SEA is occurring. It shall therefore be considered stringent if the extent of coverage in a piece of EIA legislation is broader than merely covering a physical work. To do so, it must apply to not only 'projects' or 'undertakings,' but also related programs or plans.

Along with some sort of coverage of programs or plans, a stringent piece of EIA legislation should also be clear on when it applies. Given the high degree of federal reticence to interpret the 1984 EARPGO as a binding commitment to conduct an EIA and corresponding attempts to avoid conducting them on key projects such as the Oldman River and Rafferty-Alameda dams, it is unsurprising that many analysts of EIA are suspicious of legislation that leaves application of an EIA to the discretion of a Minister or Director (see, for example, Doelle, 1993; Lindgren, 1999). The need for a clear 'trigger' mechanism is

often seen as a way to avoid the politicization of EIAs which may arise due to issues such as budget cuts or jurisdictional conflict.

Industry leaders have also expressed a desire for clarity as to when EIA legislation applies, largely for two reasons. First, there are many projects and activities small enough to merit a different process than a lengthy EA. Under the Ontario EIA system, for example, smaller projects with potential impacts significant enough to merit some sort of evaluation can be put through a class environmental assessment (Valiante, 1999). Second, an unclear 'trigger' can mean that a project or activity that is well underway may suddenly have to be put on hold while an EA is conducted because a government has realized some aspect of the project or activity requires attention. This was a frequent theme in federal committee hearings during development and review of the CEAAct and also in provincial arguments against a more assertive federal EIA role. In both cases, the essence of the objections is that confusion over jurisdiction may lead to delay if one level of government (usually the federal government) joins the EIA process after the other level of government has already granted approval. This is seen as especially frustrating if one EIA process has different requirements than another (Standing Committee on Environment and Sustainable Development [SCOESD], Oct. 21st, 1997).

(3) Alternatives

In a further effort to make sure that EIA acts less in a reactive manner and more as a genuine analysis of environmental impacts, a stringent process is now expected to require consideration of alternatives. In the most stringent of cases, this would include not only alternative means of carrying out the proposed project or activity, but also alternatives to the project or activity itself. Adherence to this latter point obviously involves something of

a shift in traditional decision-making since environmental concerns must effectively be placed on par with financial and all other concerns. Penney (1994) illustrates the contrast between these two models of decision-making in EIA and dubs them the "development" and "sustainability" paradigms. While the former paradigm identifies possible environmental effects, the response is limited to mitigation of these effects rather than consideration of canceling the project or activity entirely. An excellent example of this attitude is found in Alberta Attorney General Jim Horsman's assertion in 1989 that, because the governments of Canada and Alberta had coordinated their EIA processes and jointly approved 46 projects, "…a perfect record was achieved in terms of environmental impact assessments" (Alberta Hansard, June 16th, 1989, p. 333). This analysis does not consider whether potential impacts and alternatives were adequately discussed.

It is, of course, difficult to judge whether it is realistic or desirable for EIA legislation to follow the "sustainability" paradigm completely. Penney (1994), for instance, finds only some of the characteristics of this paradigm in the CEAAct. Nevertheless, stringent EIA legislation should have some explicit requirement for an analysis of alternatives.

(4) Decision-making

One of the main debates over the EIA process concerns who gets the final say. In many ways, it makes sense for this decision to rest with the government Department or Ministry that is responsible for the proposed project or activity. EIA, after all, is supposed to alter existing patterns of decision-making to incorporate environmental concerns as early as possible into planning. The responsible government authority should therefore, theoretically at least, be the best placed authority to judge whether these concerns are

significant enough to require mitigation or abandonment of the proposal. Gibson (1993), however, notes that "[EIAs] are an attack on the status quo. Not surprisingly, then, voluntary adoption [of assessment requirements] has been rare and unreliable" (p. 17). The possibility for a conflict of interest is heightened when the government Department (in Canada, only the federal government leaves final decision-making authority with the responsible authority) is also the proponent of the project or activity. Gibson (1993) is once again skeptical of this arrangement:

> …proponents' interests are inevitably limited. As a result, it is usually necessary to give assessment review and final decisionmaking responsibility to independent authorities or at least authorities with a mandate that emphasizes environmental protection (p. 18).

While the federal government still maintains that responsible authorities are best suited to conduct EIAs, for the purposes of this thesis EIA legislation that allocates decision-making authority to an independent authority will be seen as more stringent.

Another aspect of decision-making in an EIA process is the role of the review board or panel. This is considered important as an area where experts and interested parties can review evidence presented and issue a recommendation. As will be seen, the majority of Canadian jurisdictions treat these recommendations as mainly advisory, but there is a movement towards endowing them with greater authority as well as making them more formal by establishing permanent committees with independent members. These panels can also play an important role in ensuring the next criterion for stringency – perhaps the most controversial of any presented here – is met.

(5) Public Involvement

On the surface, the need for public involvement in the EIA process seems obvious. The wider the range of people consulted, the more likely it is that all possible effects may be considered. As Shepherd and Bowler (1997) state, public involvement ensures that the

goals and needs of the local citizens are expressed and that the project is ultimately better suited to the local environment. This not only allows for an EIA that hopefully has more legitimacy in the eyes of citizens but also provides a forum for possible conflict resolution between opposing sides. Exactly what form this involvement should take, however, is controversial. While all Canadian jurisdictions now have some commitment to public involvement, an explicit requirement is less common. Sinclair and Fitzpatrick (2002), for example, describe how the federal EIA process has four separate "tracks" for public participation – screenings, comprehensive studies, panel reviews and mediation - depending on the nature of the EIA being performed. In the case of screenings, which deal with smaller projects and account for 99% of federal EIAs, public involvement is discretionary, while for the more rigorous comprehensive study, it is required, but only once the study report has been submitted.

Indeed there are several criticisms of involving the public. It can be expensive and time-consuming, especially if it results in a need to revise the project. It may be seen as unnecessary considering the majority of people are probably not knowledgeable enough about the project or the environment to effectively weigh the costs and benefits of the proposal (Shepherd & Bowler, 2002). And some debate how much it reduces conflict. Bérubé and Cusson (2002) argue that: "[t]oo often, 'civil society,' represented by environmental interest groups … focuses solely on adverse local impacts" (p. 1296). For the purposes of this research, however, it will be assumed that an explicit requirement for public involvement leads to more stringent EIA legislation.

It is also very important that the public be given access to the process early enough to have an impact on decision-making. Smith (1982) identifies three levels at which

involvement can occur: the normative level, where the planning for what should be done takes place; the strategic level, where it is decided what will be done; and the operational level, where it is decided how to do it. As Shepherd and Bowler (2002) note, lack of early public involvement – before the operational level in the framework presented above – can lead to cynicism with the EIA process and a feeling that the only way to express reservations in a meaningful fashion is through a legal challenge. Sinclair and Doelle (2003) highlight several key points in ensuring timely public involvement, including the need for legislation to have access to information provisions that give early notice of the intended project to the public and provisions for public input in an EIA process such as a screening that does not involve a panel review or a public hearing. EIA legislation can also limit public involvement by having a narrow definition of who needs to be consulted and by allowing information to be excluded from public consideration at the Minister's discretion. Although it is clearly quite complicated to evaluate which pieces of EIA legislation require early public involvement, some sort of attempt must be made. EIA legislation that requires public input before the assessment document is submitted to the respective authority for approval shall therefore be interpreted as fulfilling the highest degree of stringency. While this may seem too lenient an evaluation to some since it requires public consultation only at the operational level of a proposal, the comparative nature of this research makes it desirable that at least one jurisdiction meet the criteria laid out.

(6) Implementation

No EIA process can truly be evaluated without considering its provisions for ensuring effective implementation of its decision. Although it may seem simplistic to state

that EIA legislation must contain the ability to enforce the terms and conditions accompanying an approval, this has not necessarily been the rule across Canada. For instance, the federal government, as previously mentioned, has consistently favoured leaving a great deal of the EIA process in the hands of the responsible authority. This includes control over ensuring that any mitigation measures deemed appropriate are carried out. Thus, there are no explicit offence provisions in the CEAAct.

A related measurement of the stringency of an Act's implementation provisions is the subject of effects and compliance monitoring. Due to the wide range of subjects that might be dealt with in one EA and the need to predict the possible impacts of the proposed project over time, there is unavoidably an element of inexactitude in the findings. It is therefore important to keep an eye on the situation even after the project is approved. Sadar (1996) sees this monitoring as a means to "…verify the accuracy of impact predictions, establish what impacts actually occur, and to modify the mitigation measures to improve their effectiveness" (p. 108) and lays out a number of principles for effective monitoring, including having a clear system for funding these follow-up activities and ensuring that affected citizens have a role in deciding on any changes to be made. Doyle and Sadler (1996), furthermore, divide monitoring into three categories in their evaluation: surveillance of construction of the project; the actual monitoring of effects; and regular audits of approved projects. Partially because Canada's governments score so poorly in the first and third categories, but also for the sake of simplicity, this research shall focus on the second category and use it as the only measure of monitoring. Again, in order to be considered stringent, an explicit commitment must be found in EIA legislation.

(7) Transboundary Provisions

Environmental impacts occur irrespective of political borders. Kennett (1995) describes the growing recognition that EIA must operate along an ecosystem approach, which "…avoids imposing geographic constraints, arbitrary from an ecosystem perspective, on the review of environmental impacts" (p. 265), while also allowing for citizens outside the political jurisdiction within which the project is taking place to have a say. In Canada, there has been conflict over the means for recognizing and addressing transboundary impacts. First, the federal EIA process could be designed to trigger an EA if it is expected that significant transboundary effects could result from a proposed project. As will be seen, however, such an arrangement has generated considerable provincial opposition. Second, provincial EIA processes could allow for incorporation of extraterritorial concerns. This latter arrangement seems to be the favoured approach in Canada, mainly through provisions allowing for either the opportunity for other jurisdictions to have input into an EIA process, or for the harmonization of EIA processes in the event of multiple jurisdictions becoming involved. While there is certainly a valid question as to whether these measures permit adequate representation of extraterritorial interests in a provincial EIA, it shall be assumed here that clauses permitting extraterritorial involvement and harmonization meet the criteria of stringency. Having discussed the preceding seven qualities, it is now possible to apply them to Canadian EIA legislation between roughly 1985 and 1995. In so doing, this research will attempt to demonstrate an overall upward trend in the stringency of government processes.

4.2 The Development of Canadian EIA Legislation

Over the last 30 years, EIA legislation in Canada has developed in fits and starts. The first burst of interest in EIA came in the early 1970s after the passage of the NEPA in the United States. Described by Doern and Conway (1994) as "…a sustainable-development initiative long before its time" (p. 193), the NEPA, passed in 1970, met many of the criteria of stringency that many Canadian EIA processes were still falling short of two decades later. For example, American agencies were required to consider 'historical, cultural, economic, social and health effects' along with environmental effects an EA could be conducted on legislative proposals and major programs along with specific projects. A significant weakness of the NEPA, however, is often seen to be its allowance for judicial review, which Moffet (1994) argues is expensive, overly time-consuming and an unnecessarily confrontational method of dispute resolution. While Shepherd and Bowler (1997) attribute this to inadequate opportunity for public involvement, Doern and Conway (1994) argue that the American example was interpreted by Canadian environmental policy-makers as a sign that an EIA process entrenched in law should be avoided until some solution to the unpredictability and expanse of legal challenges could be found.

The first series of Canadian initiatives in EIA were therefore non-legislated processes that were largely non-binding in nature. As previously discussed, this research focuses on the development of EIA processes at the federal level and in the five westernmost provinces. Although two of these provinces had EIA legislation in place by 1980, it was not until the late 1980s and early 1990s that comparable legislation was enacted across the remaining jurisdictions. Each jurisdiction shall now be examined in

turn, with a focus on evaluating the stringency of EIA processes in place in the mid-1980s and comparing them with the EIA processes in place by the mid-1990s. It will become apparent that there was a significant, widespread movement towards increasing the stringency of these processes around the same time. Although the reasons for this rise will be analyzed in more detail in the following chapter, it is important to note that by the late 1980s two fundamental changes were occurring in environmental policy: public concern for environmental protection was on the rise; and the federal government – partially against its will – was assuming a larger role in EIA in Canada.

While arguments can be made that either one of these changes was responsible for the timing of the many process reforms, some aspects of the changes that occurred suggest the latter was preeminent. Assuming that a Canada-wide surge in public concern was the dominant factor, one might expect a fairly uniform upward movement, yet there is significant variation in the degree of change that occurred from one province to another. The one area in which there were significant changes in nearly all of the jurisdictions examined – transboundary provisions – was a necessary preliminary for the signing of agreements to harmonize EIA processes. As Chapter 5 will discuss, a key provincial goal of these agreements was to deal with the problems presented by this new increased federal involvement.

Throughout this chapter, a series of tables will be used to illustrate the changes in jurisdictions' EIA processes over the chosen period. As discussed in Chapter 3, the symbols used are designed to represent the relative stringency of the various chosen criteria. The actual meaning of these symbols – described in the legend at the end of this chapter (page 68) – vary between criteria. For example, the highest degree of stringency

for consideration of alternatives is not the same as the highest degree of stringency for enforcement and offence provisions, even though they would both be indicated by the same symbol. The degrees of stringency within a given criterion would, however, be the same across jurisdictions. Thus, two identical symbols indicating the stringency of the federal government's and Alberta's commitments to consider cumulative effects would have the same meaning. The reader should keep in mind that the main purpose of presenting the data in this manner is to assess the significance of the changes within each jurisdiction and to identify common areas of improvement.

4.2.1 Federal Government

Up until the ruling of the 1989 Federal Court of Canada ruling in the case of *Canadian Wildlife Federation et al v Minister of the Environment and Saskatchewan Water Corporation*, EAs were conducted on a discretionary basis at the federal level. While the 1987 Speech from the Throne had stated the government's intention to introduce EIA legislation, the CEAAct would not be approved until 1992 and would not come into effect until 1995. In the meantime, the EARPGO would suddenly assume a much greater role. This process had first been introduced in 1973 and was updated in 1977 and 1984; the latter time being when it was given Guidelines Order status.

As illustrated by Table 4.1.1, there was an overall increase in the stringency of the federal EIA process from 1985 to 1995. Whereas the EARPGO had a very weak commitment to sustainability, the 1995 CEAAct scored very high. Although the EARPGO did mention that an assessment could include consideration of socio-economic effects, this would only occur at the discretion of the Minister of the Environment and the Minister of the initiating Department. While the EARPGO scored slightly higher in terms of the

Table 4.1.1 EIA Processes at the Federal Level

	1984 Environmental Assessment and Review Process Guidelines Order	1995 *Canadian Environmental Assessment Act*
(1) Commitment to Sustainability		
Broad Definition of Environmental Effects	x○ 4(2)	● 2(1)
Cumulative Effects	x	● 16(1(a))
(2) Scope of Act		
Extent of Coverage	○● 2	○ 2(1)
Size of Project	○●6	● 5(1)
(3) Alternatives	x○ 12	○● 16(1(e), 2(b))
(4) Decision-making		
Independent Authority	○ 12	○ 20, 37
Independent Review Panel or Board	○● 22, 31	○● 33, 34
(5) Public Participation		
Required or Voluntary	○ 12(e)	● 4(d)
Type of Involvement	○ 27(1)	○● 18(3), 19(2), 22, 35(3), 55
(6) Implementation		
Enforcement and Offence Provisions	x	○ 50, 51
Effects and Compliance Monitoring	x	x○ 38
(7) Transboundary Provisions	○ 17	● 4(c), 12(4), 40, 46, 54
Aboriginal Involvement		10(1), 48

extent of its coverage – defining "proposal" as "…any initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility" [2] – this must be qualified by adding that Federal Departments did not expect to have to conduct an EA except when they chose. Meanwhile, the CEAAct used a series of regulations to attempt to provide more clarity about what size project would have to undergo what type of EA. The CEAAct was also much more explicit about its requirements for alternatives – both

concerning the different methods of conducting the project and about whether the project was necessary – while the EARPGO only required an identification of adverse effects and whether they were mitigable. The CEAAct scores slightly less than perfect, however, because consideration of alternatives is not explicitly mandatory in the case of screenings.

Possibly the most controversial aspect of the federal EA process – and one which the CEAAct continued – was the practice of leaving the decision-making largely in the hands of the Responsible Authority (RA). While the Minister of the Environment would become involved if the RA decided a public hearing was necessary, the Canadian Environmental Assessment Agency – previously the Federal Environmental Assessment Review Office – played mainly a supporting role of providing information to the RA. The federal government has consistently argued that self-assessment permits environmental concerns to be considered earlier on in the planning process. Critics, however, express concern over the possibility of a conflict of interest, since the RA is also often the project proponent (Penney, 1994). Apart from the possibility of a public hearing, the CEAAct contained many more assurances of public involvement than its predecessor. Again, however, in the case of a screening these clauses are somewhat less stringent than in the case of a more rigorous comprehensive study. The former requires that the RA "…[be] of the opinion that public participation in the screening of a project is appropriate in the circumstances…" [18(3)] if public comments are to be solicited.

While the EARPGO contained one reference to agreements with the provinces, territories or other countries, the CEAAct made extensive provision for them. These included clauses ensuring that its requirements were not compromised by such an agreement and clauses for the consideration of "significant adverse environmental effects"

[46(1)] in another province by a mediator or review panel. Furthermore, the CEAAct included substantial provisions asserting the federal right to conduct an EA if Aboriginals would possibly be affected. Although this was not included as one of the criteria of stringency, it is an important aspect of what could be seen as the reasons for keeping the federal government involved in EIA.

4.2.2 British Columbia

EIA in British Columbia was, until the passage of the *Environmental Assessment Act* in June 1995, conducted through non-legislated processes and a variety of Acts dealing with specific types of projects. In 1976 the Guidelines for Coal Development became the first process to lay out a procedure for environmental review of projects. The Ministry of Energy, Mines and Petroleum Resources published the Procedures for Obtaining Approval of Metal Mine Development in 1979 and these two review procedures were combined into the Mine Development Review Process in 1984. The 1991 *Mine Development Assessment Act* formalized this procedure into the Mine Development Assessment Process. The 1980 *Utilities Commission Act*, meanwhile, established the Energy Project Review Process, which was also administered by the Ministry of Energy, Mines and Petroleum Resources. And the 1981 *Environmental Management Act* made the first statutory reference to EIA and gave the Ministry of the Environment authority to require an environmental assessment. This wide-ranging but vague procedure eventually crystallized into the 1990 Major Project Review Process, which was jointly administered by the Ministries of Environment, Lands and Parks, and Employment and Investment.

In order to consolidate this somewhat scattered series of processes, the evolution of EIA in British Columbia shall be examined in three stages. In the first stage, the processes

in place in 1985 will be evaluated. These processes are the ability of the Environment Minister to order an environmental assessment under the *Environmental Management Act*, the Energy Project Review Process under the *Utilities Commission Act*, and the Mine Development Review Process. The second stage shall evaluate those measures in place in 1991 after the need for reform of the EIA process had become apparent, namely the *Mine Development Assessment Act* and the Major Project Review Process. The third stage shall evaluate the *Environmental Assessment Act*.

Stage One: 1985

As Table 4.2.1 shows, the EIA measures in place in 1985 were basic in nature. The *Environmental Management Act* (EMA) was the first provincial statute to actually mention environmental assessment. The *Utilities Commission Act* (UCA) and the Mine Development Review Process (MDRP), meanwhile, addressed EIA indirectly through licensing procedures for energy and mining projects, although the former required a surprisingly broad consideration of "…impacts by the project on the physical, biological and social environments" [Reg 388/80]. The EMA had the widest coverage of the three, permitting consideration of a "…work, undertaking, product use or resource use…" [4(1)] but was severely limited because its application was left entirely to the discretion of the Minister of the Environment. This could not only lead to projects not being reviewed, but could also make it difficult for proponents to know whether or not they would have to perform an environmental assessment. The UCA and the MDRP both relied on specific lists of projects to trigger an assessment, which were based largely on the size of the project. All three processes had weak provisions for the consideration of alternatives, requiring proposals for mitigation of effects, but focusing mostly, as stated in the MDRP on

Table 4.2.1 EIA Processes in British Columbia: 1985

	1981 *Environmental Management Act*	1980 *Utilities Commission Act*	1984 Mine Development Review Process
(1) Commitment to Sustainability			
Broad Definition of Environmental Effects	○ 1(2)	● Reg 388/80	○●
Cumulative Effects	x	x	x
(2) Scope of Act			
Extent of Coverage	○ 4(1)	○ 16	○
Size of Project	x 3	○ 16	○
(3) Alternatives	x○ Reg 330/81	x○ Reg 388/80	x○
(4) Decision-making			
Independent Authority	● 3	○ 21	○
Independent Review Panel or Board	x○ 11	○ 19(1)	x○
(5) Public Participation			
Required or Voluntary	x	○ Reg. 388/80	●
Early Involvement	x	x○ 20(1)	○
(6) Implementation			
Enforcement and Offence Provisions	● 9, 14	x	x
Effects and Compliance Monitoring	x	x, ○ Reg 144/91	x
(7) Transboundary Provisions	x	x	x

whether "…project benefits [are] sufficient to outweigh major social or environmental impacts" (MDRP).

In terms of decision-making, the EMA was the only process administered by the Ministry of the Environment. The final decision under the UCA and the MDRP rested with the provincial Cabinet. As previously discussed, such a scenario often results in the

Minister of the Environment confronting several other Ministers responsible for economic development. In this case, where both processes were administered by the Ministry of Energy, Mines and Petroleum Resources, the Environment Ministry was not involved until the approval stage. At this late stage, it would seem that a call for further study would be often seen as unnecessary delay. Furthermore, while assessments under the UCA could involve input from the Commission for Public Utilities, it was subject to Ministerial discretion. The EMA established an Environmental Appeal Board, but did not link it to environmental assessments, while the MDRP allowed for referral of an application to the Mine Development Steering Committee, which was within the Ministry of Energy, Mines and Petroleum Resources.

Clauses for public participation were fairly limited in all three processes. The EMA contained no references to it, the UCA required a description of public information and consultation measures undertaken and that the hearings of the Commission for Public Utilities be open to the public, and the MDRP required distribution of the project prospectus to local actors such as Native groups as well as information on "…the reaction of the public at large to project proposals" (MDRP). Each process was also weak in terms of implementation. The EMA was the only one to have explicit enforcement and offence provisions, while effects and compliance monitoring was non-existent across the three processes until the passage of Regulation 144/91.

Stage Two: 1991

By the time this Regulation was passed, the EIA processes in all of the jurisdictions examined here were undergoing reform or review. In British Columbia, two new processes emerged: the Major Project Review Process (MPRP) and the *Mine Development*

Assessment Act (MDAA). These processes, illustrated in Table 4.2.2, demonstrated an increased emphasis on public involvement and saw the beginning of transboundary involvement, although they essentially served as stopgap measures until the *Environmental Assessment Act* became law. The MDAA, for instance, never had any accompanying regulations passed.

Both processes required an analysis that went beyond purely biophysical effects. The MDAA, however, did not explicitly define environmental effects. A commitment to early examination of "socio-economic and community impacts" was merely laid out as an objective of the legislation. As in the 1985 processes, both the MPRP and the MDAA limited their applicability to projects over a certain size. And while the MPRP required description of "environmental management during construction and operation," the MDAA limited discussion of alternatives to a consideration of impact mitigation.

In terms of decision-making, both processes continued to rely on joint responsibility between either the Ministry of Energy, Mines and Petroleum Resources in the case of the MDAA, or the Ministry of Development, Trade and Tourism in the case of the MPRP, and the Ministry of the Environment. Both processes also provided for the appointment of independent review panels which made recommendations to the decision-making authorities, although appointment of a panel was still left to Ministerial discretion. This was a slight drawback for the MDAA in terms of stringency, since the panel review was the major mechanism for public involvement. By contrast, the MPRP listed public involvement as one of its main objectives and required public information meetings and publication of key documents along with the possibility of a public review panel.

Table 4.2.2 EIA Processes in British Columbia: 1991

	1991 *Mine Development Assessment Act*	1990 Major Project Review Process
(1) Commitment to Sustainability		
Broad Definition of Environmental Effects	○●	●
Cumulative Effects	x	x
(2) Scope of Act		
Extent of Coverage	○ 1(1)	○
Size of Project	○ 1(1)	○
(3) Alternatives	x○	○
(4) Decision-making		
Independent Authority	○ 3(1(b))	○
Independent Review Panel or Board	○ 4, 5	○
(5) Public Participation		
Required or Voluntary	○● 2(4(b(i)))	●
Early Involvement	○	●
(6) Implementation		
Enforcement and Offence Provisions	○● 12	x
Effects and Compliance Monitoring	x	x
(7) Transboundary Provisions	○ 8	●

Significantly, it made specific mention of the need to provide notice and information to local Native groups.

The MPRP once again demonstrates the major weakness of a non-legislated program due to its lack of enforcement and offence provisions. Although the MDAA had enforcement provisions, it did not detail the specific monetary penalties an offender would incur. Both processes were notable, however, for their inclusion of mechanisms to deal with transboundary effects. While the MDAA authorized the Minister to enter into agreements with other jurisdictions, the Major Project Steering Committee, which

administered the MPRP, included representatives from both the Federal Environmental Assessment and Review Office and Environment Canada.

Stage Three: 1995

The 1995 British Columbia *Environmental Assessment Act* (BCEAA) was, according to this set of criteria, likely the most stringent piece of EIA legislation in Canada. While subsequent amendments have dismayed some environmentalists due to a perceived weakening in areas such as what automatically triggers an environmental assessment (see, for example, Sumi & Young, 1998), the upward jump in stringency from the processes in place in 1991 to the BCEAA is remarkable. Not only did the latter require consideration of "…environmental, economic, social, cultural, heritage and health effects…" [2(b)], but, for the first time in British Columbia, some attempt was made to judge the probable cumulative effects of the project. The Act applied to proposals for "projects," but also to modification or abandonment of a project as well as "any activities related to the project…" [1]. Like its predecessors, the 1995 BCEAA was triggered by a list of projects, but also allowed for designation of a project as reviewable. Consideration of alternatives, while not attaining the uppermost level of stringency, was explicitly required.

While the ultimate decision still lay with the Lieutenant Governor in Council and the approval of the responsible Minister (i.e. the Minister responsible for the specific type of project being evaluated) along with the Ministers of Sustainable Resource Management and Water, Land and Air Protection was still necessary, environmental assessments were now coordinated by the independent Environmental Assessment Office. Furthermore, while referrals to the Environmental Assessment Board remained at the Ministers' discretion, hearings were required to be public and appointees were to be chosen based on

Table 3.2.3 EIA Processes in British Columbia: 1995

	1995 *Environmental Assessment Act*
(1) Commitment to Sustainability	
Broad Definition of Environmental Effects	● 1, 2(b)
Cumulative Effects	● 22(j)
(2) Scope of Act	
Extent of Coverage	● 1
Size of Project	○ 4, Reg 276/95
(3) Alternatives	○ 22(e)
(4) Decision-making	
Independent Authority	○● 20, 30, 34
Independent Review Panel or Board	○● 30, 48
(5) Public Participation	
Required or Voluntary	● 14
Type of Involvement	● 16(1), 52
(6) Implementation	
Enforcement and Offence Provisions	● 71, 76(2), 78
Effects and Compliance Monitoring	● 38(1)
(7) Transboundary Provisions	● 7(2(m)), 9(2), 22(k), 86, 87
Aboriginal Involvement	7(2(k)), 87.1

expertise in the anticipated effects of the project. Another significant change which deserves mentioning is that project proponents could be ordered to pay for the hearing's costs, helping to ensure some degree of intervenor funding. The Act also contained extensive enforcement and offence provisions and broke new ground by incorporating provisions allowing for effects and compliance monitoring. This included not only monitoring of mitigation requirements, but also comparing anticipated effects with actual effects.

Following the trend started by the 1991 EIA processes, the 1995 BCEAA contained extensive transboundary provisions requiring measures such as inclusion of representatives

from other jurisdictions on committees and permitting modification of the Act's processes to allow for the proper functioning of an agreement with another jurisdiction. Representatives of affected First Nations were also to be included on committees and the proponent was required to distribute information to and consult with these affected communities.

4.2.3 Alberta

EIA in Alberta, like that of its western neighbour, involved a complicated series of Acts until the passage of one consolidated Act in the early 1990s. Unlike, British Columbia, however, Alberta relied on a single piece of legislation – the 1973 *Land Surface Conservation and Reclamation Act* (LSCRA) – for the actual EIA process. Approval by the Minister of the Environment under the LSCRA was also only one step for a project proponent, since it was also necessary to gain other permits under resource-specific Acts such as the 1975 *Water Resources Act*, under which the Oldman River dam was licensed, as well as under environmental Acts such as the 1971 *Clean Water Act*. The 1992 *Environmental Protection and Enhancement Act* (EPEA) would in fact encompass seven Acts of the latter variety. For the purposes of this research, however, only the EIA process prior to 1992 – namely, the LSCRA, supplemented by Alberta Environment's Environmental Impact Assessment Guidelines (1985) - shall be compared with the EPEA.

What emerges from this analysis is the transition from a lacklustre EIA process with a very limited legislative base into one of the most stringent of those discussed. As illustrated by Table 4.3.1, the LSCRA had a much weaker commitment to sustainability, with only the Guidelines stating that effects on social, economic and cultural conditions were "normally" addressed. The scope of both Acts scores the same on this scale, although

Table 4.3.1 EIA Processes in Alberta: 1985-1995

	1973 *Land Surface Conservation and Reclamation Act*	1993 *Environmental Protection and Enhancement Act*
(1) Commitment to Sustainability		
Broad Definition of Environmental Effects	○ 8(1)	● 49(d)
Cumulative Effects	x	● 49(d)
(2) Scope of Act		
Extent of Coverage	○ 8(1)	○ 39(e)
Size of Project	○ Reg 125/74, 228/82	○ Reg 111/93, 211/96
(3) Alternatives	○ 8(3)	● 49(h)
(4) Decision-making		
Independent Authority	● 1(k)	● 1(mm)
Independent Review Panel or Board	x○ Reg 125/74	● 90, 98(2)
(5) Public Participation		
Required or Voluntary	○	○● 40(d), 95(2)
Early Involvement	x	○ 44(6), 49(l), 91(1(i)), 103
(6) Implementation		
Enforcement and Offence Provisions	● 8(6), 9, 18	● 227, 228
Effects and Compliance Monitoring	x	○● 49(i)
(7) Transboundary Provisions	x	● 19, 57

the EPEA deals with "activities" instead of "developments," and both rely on lists of regulated activities or developments, with EPEA's lists being more comprehensive. EPEA also contains much more stringent clauses concerning alternatives, requiring "a consideration of the alternatives to the proposed activity, including the alternative of not proceeding with the proposed activity" [49(h)], while the LSCRA included only the possibility that the Minister might require consideration of alternative means of

construction. The Guidelines helped somewhat by stating that a report should include proposals to avoid adverse effects.

The EPEA continues to outperform its predecessor throughout the remaining sections. While both Acts give final decision-making authority to the Minister of the Environment, the EPEA establishes the Environmental Appeal Board, which may reverse initial decisions taken by the Director in charge of EAs. The LSCRA, meanwhile, established several committees, but they were mainly fora for interministerial collaboration. Both Acts also provide for referral of an EA concerning related material to committees established under other legislation, such as the Energy Resources Conservation Board or the Natural Resources Conservation Board, where there will be a public hearing. Apart from this, however, public participation stands out as a weaker area of EIA in Alberta. The LSRA did not mention involving the public, while the Environment Ministry's Guidelines only added that "[p]roponents are encouraged to let the public review the EIA before submitting it to Alberta Environment" (p. 7). Though the EPEA is a significant improvement, it does not match the rigour of some of its 1995 counterparts in ensuring early dissemination of information. And while there are means to contest rulings, a citizen must be considered to be "…directly affected by a proposed activity…" [44(6)] to submit a statement of concern. This weakness does not extend to implementation, where the EPEA contains provisions requiring the proponent to submit plans for monitoring impacts. Unlike the LSRA, the EPEA also contains transboundary provisions which allow the Minister to enter into agreements with other jurisdictions on "…any matter pertaining to the environment…" (19) and also allow for joint assessments.

4.2.4 Saskatchewan

Saskatchewan developed one of the earliest pieces of EIA legislation in Canada. After operating through an Environmental Impact Assessment Policy for four years, the Saskatchewan *Environmental Assessment Act* (SEAA), passed in 1980, remains the means through which EAs are conducted. While the Saskatchewan Environmental Assessment Review Commission (1991) undertook a review of the EIA process in 1990 that made significant recommendations including earlier public involvement, increased harmonization with other jurisdictions and policy-level EA, no amendments to the SEAA were made. Nor have any accompanying regulations ever been passed. The Saskatchewan Department of the Environment (SDOE) has, however, provided Guidelines for the Preparation of a Project Proposal (2003) which were developed in late 1986 and early 1987 during the creation of an EA for the Rafferty-Alameda dams. The stringency of Saskatchewan's EIA process, therefore, shall be judged on these guidelines as well as the 1980 SEAA.

The SEAA is comparable to those processes in place in 1985 in terms of stringency, but it does not fare so well when viewed alongside other Canadian EIA processes ten years later. In relation to sustainability, the SEAA includes "…social, economic and cultural conditions…" [2(e)] that are related to biophysical matters such as air, land and water in its definition of "environment" but the SDOE Guidelines pay little attention to them. The SEAA covers "developments," which are projects or activities or alterations to them, and bases the trigger mechanism on whether a development meets any of six criteria. While this may make it unclear for project proponents as to whether their development will require an EA, basing the trigger on whether an undertaking "substantially utilize[s] any provincial resource..," "cause[s] widespread public concern because of potential

Table 4.4.1 EIA Processes in Saskatchewan

	1980 *Environmental Assessment Act*
(1) Commitment to Sustainability	
Broad Definition of Environmental Effects	○● 2(e)
Cumulative Effects	x
(2) Scope of Act	
Extent of Coverage	○ 2(d)
Size of Project	● 2(d)
(3) Alternatives	○
(4) Decision-making	
Independent Authority	● 2(g), 15
Independent Review Panel or Board	x○ 5(d), 14
(5) Public Participation	
Required or Voluntary	○● 11(2), 13
Early Involvement	x○ 11(2), 13
(6) Implementation	
Enforcement and Offence Provisions	● 20, 21
Effects and Compliance Monitoring	x○
(7) Transboundary Provisions	○ 5(f)

environmental changes," or "ha[s] a significant impact on the environment…" [2(d)], it avoids the possibility that a variety of projects will not be subject to an EA because of their exclusion from a specific list. The need to discuss alternatives is mentioned only in the SDOE Guidelines, not in the actual legislation.

The SEAA's scores vary across the remaining sections. Saskatchewan was one of the first jurisdictions, for example, to give decision-making authority to the Minister of the Environment alone. The forming of a review panel or board is entirely at the Minister's discretion, as are its terms of reference. The Rafferty-Alameda board of inquiry was the first created under SEAA, seven years after it became law. The need for public information meetings is also at the Minister's discretion, although the SDOE Guidelines require the

proponent to document its public participation program. This publication of reasons for not requiring an EA, but these changes are not reflected in the table. The SEAA does contain enforcement and offence provisions, but requirements for effects and compliance monitoring are limited to the SDOE Guidelines, which ask only that "…contingency plans and monitoring programs … be outlined" (p. 3). The SEAA also provides for agreements "…with any government or person with respect to the environment, assessments or statements" [5(f)].

4.2.5 Manitoba

The Manitoba *Environment Act* (MEA) was passed in mid-1987 and proclaimed into force in early 1988 and, as such, may be considered the first piece of legislation aimed strictly at the EIA process to come into being during the 1985-1995 period. It underwent only one amendment significant to this research during this period, although two accompanying regulations will be noted. The MEA was based on a 1975 Cabinet Directive which established a provincial Environmental Assessment Review Policy, but considering how early it was passed, the evaluation of the stringency of Manitoba's EIA process shall be based exclusively on the legislation.

The MEA scores very highly in terms of stringency when compared to the other processes in place in the late 1980s and also fares reasonably well alongside the processes in 1995. Not only does it require consideration of "…social, economic, environmental, health and cultural conditions…" [1(2)] but it also alludes to cumulative effects. The Act covers "developments," which means "… any project, industry, operation or activity" [1(2)] and relies on an extensive list to determine whether a development is subject to an EA. Manitoba has a unique 'class' system for its EAs in which developments are divided

Table 4.5.1 EIA Processes in Manitoba

	1987 *Environment Act*
(1) Commitment to Sustainability	
Broad Definition of Environmental Effects	● 1(2)
Cumulative Effects	○ 1(2)
(2) Scope of Act	
Extent of Coverage	○ 1(2)
Size of Project	○ Reg 164/88
(3) Alternatives	x○ 11(9c), 12(5c)
(4) Decision-making	
Independent Authority	● 10(8), 11(11), 12(7)
Independent Review Panel or Board	○● 6(1)
(5) Public Participation	
Required or Voluntary	● 10(4), 11(8), 12(4)
Early Involvement	● 10(7), 11(10), 12(6)
(6) Implementation	
Enforcement and Offence Provisions	● 31, 33
Effects and Compliance Monitoring	x
(7) Transboundary Provisions	● 13.1 [1991], Reg 126/91

into three categories, with those with potentially wide-ranging impacts subject to a different process. These variations, where relevant, shall be mentioned. In terms of alternatives, for instance, classes two and three contain clauses stating the director or Minister respectively "may" require consideration of different ways to carry out the development, while class one contains no reference to alternatives at all.

The MEA scores fairly highly in the remaining criteria. Decision-making authority rests exclusively with the Department of the Environment and the Clean Air Commission, established under the legislation, can be called upon to give recommendations and to coordinate public involvement. While these public hearings are at the director's or Minister's discretion, the project proposals for all three classes are also made public after

they are received and opportunity for comment and objection must be provided. Enforcement and offence provisions are quite stringent, although effects and compliance provisions are lacking.

Manitoba's transboundary EIA provisions and accompanying Joint Environmental Assessment Regulation were passed in 1990/91 and are therefore of more interest to this research. These provisions allow the Minister of the Environment to either authorize a joint EA or to submit to the other jurisdiction's EIA process. The Minister must be satisfied that the other process is at least equivalent to Manitoba's and public hearings in the province must be held.

4.2.6 Ontario

The 1975 Ontario *Environmental Assessment Act* (OEAA) was remarkable not only for the fact that it was passed at such an early date, but also because it was such a strong piece of EIA legislation. Like all of the other jurisdictions discussed here, Ontario's process underwent a significant review beginning in the late 1980s. Many of the ensuing recommendations from Ontario Environment's (1990) report were in some stage of implementation when the incumbent NDP government was defeated in the 1995 election. The new Progressive Conservative government changed paths somewhat, deciding to focus on increasing efficiency and reducing delays and passed a new Act in 1996. Given this late date but also the fact that the focus of the new Act did not really stem from the 1990 report, the evaluation of Ontario's EIA process from 1985-1995 shall be based on only the 1975 Act and its related amendments and regulation.

Ontario's high score on these criteria helps to illustrate that many of the reforms other governments adopted around 1990 were already considered policy options in the early

Table 4.6.1 EIA Processes in Ontario

	1975 *Environmental Assessment Act*
(1) Commitment to Sustainability	
Broad Definition of Environmental Effects	● 1(c)
Cumulative Effects	x
(2) Scope of Act *Extent of Coverage* *Size of Project*	● 1(o), 17 ● 3* x 3(c)** [RSO 1990]
(3) Alternatives	● 5(3(b)(c))
(4) Decision-making	
Independent Authority	● 1(f), 14
Independent Review Panel or Board	○● 18, 24
(5) Public Participation	
Required or Voluntary	○● 7(1)(2), 19
Early Involvement	○ 19
(6) Implementation	
Enforcement and Offence Provisions	● 29, 40
Effects and Compliance Monitoring	○ 14(b(iii))
(7) Transboundary Provisions	○ 18.1 [1994]

* Applies only to public undertakings
** Applies to private undertakings

1970s. While cumulative effects assessments were largely things of the future, the OEAA included "social, economic and cultural conditions" in its definition of "environment" [1(c)]. The Act's coverage extended to "undertakings," which included "an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity…" (1[o]) as well as changes to undertakings. The size of the project, however, was one of the more criticized elements of the OEAA, since initially the legislation only applied to public undertakings. While it was later amended to allow the Minister to require EAs of private undertakings when necessary, this was hardly a stringent or predictable trigger. In contrast

to this weakness, the Act required consideration of alternatives to the undertaking itself almost 20 years before any other EIA process examined here would.

The remaining clauses were consistently stronger than those in other Canadian EIA processes at the time. Not only was the Minister of the Environment designated as the final decision-making authority, but an independent Environmental Assessment Board was established which conducted public hearings and whose decision could only be overturned by the Minister for 28 days after it was decided. Public involvement clauses existed, but allowed the public access only after an EA was submitted to the Environment Ministry. Any person could, however, require a hearing by the Environmental Assessment Board. In addition to enforcement and offence provisions, furthermore, the OEAA gave the Minister authority to require monitoring programs and reports. And finally, the Act was amended in 1994 to allow the Board to sit jointly with "…any tribunal established under the law of another jurisdiction" [18.1].

4.3 Conclusion

What emerges from this analysis is that, essentially over a period of five years, the EIA processes of the jurisdictions examined underwent significant review and notable – though uneven – reform. In Saskatchewan, such a review produced dozens of recommendations yet made very little impact in the actual EIA process, which instead evolved throughout the 1990s via policy changes within the Department of the Environment. Manitoba, which only established a legislated EIA process in 1987, likewise made very few changes in the following years. Ontario made minor changes to its coverage of private undertakings, but, despite a major review, did not produce a reformed Act until 1995, when a change in government also resulted in a change in focus. British Columbia

and Alberta, meanwhile, revolutionized their EIA processes, not only through dramatic overall increases in stringency, but also through commitments to newly emerging areas such as CEAs and effects and compliance monitoring.

The most significant change in an EIA process, however, occurred at the federal level. Not only did the federal government become legally obligated to perform EAs on a wide variety of projects, but the subsequent development of the CEAA resulted in a much more stringent process than had existed under the EARPGO. This increase in stringency is evident across all the criteria presented in the preceding chapter, with the exception of decision-making, which remained the same. In terms of intergovernmental interaction, therefore, these changes meant that the provinces were now faced with widespread federal involvement in areas where there had been little before, with federal Departments operating according to legislation which had more demanding information requirements than its predecessor. Of special interest in this regard is the development of transboundary provisions; the only one of the seven criteria for stringency where there was a near-unanimous upward trend across the jurisdictions examined. As will be discussed in the following chapter, the need for such provisions was one of the key issues in the Rafferty-Alameda court decisions and was necessary in facilitating the movement towards the harmonization of Canada's EIA processes.

Legend

(1) Commitment to Sustainability	
Broad Definition of Environmental Effects	● Biophysical, socio-economic, cultural ○ Biophysical and its effects
Cumulative Effects	● Explicit requirement ○ Implied or guideline basis x Not required
(2) Scope of Act	
Extent of Coverage	● Projects, activities, programs, plans ○ Projects, activities
Size of Project	● Major and minor impacts, large and small projects ○ Specific list of projects x Major projects or Ministerial discretion
(3) Alternatives	● Requirement to examine alternatives to project (including need for project) ○ Requirement to examine alternative methods of implementing project
(4) Decision-making	
Independent Authority	● Decision by independent authority ○ Decision by responsible authority
Independent Review Panel or Board	● Independent review panel with binding decision-making authority ○ Independent review panel with advisory role x No independent review panel
(5) Public Participation	
Required or Voluntary	● Statutory requirement ○ Voluntary and suggested in guidelines
Type of Involvement	● Public comments sought during process ○ Proceedings open to public comment x Documents released after decision
(6) Implementation	
Enforceable Conditions	● Explicit approval and offense provisions ○ Enforcement under other regulations x No enforcement provisions
Effects & Compliance Monitoring	● Monitoring of implementation of conditions or period audits and monitoring of post-approval effects ○ Monitoring of post-approval effects x No monitoring
(7) Transboundary Provisions	● Allows input from affected jurisdictions and harmonization initiatives ○ Allows harmonization initiatives x No provisions

Chapter 5: Federalism and Environmental Impact Assessment

Now that the specifics of when and how the EIA processes changed across the six jurisdictions examined here have been explored, it is possible to attempt some further analysis of how the interaction between the federal and provincial governments has affected the development of EIA policy in Canada. This will require a consideration not only of events and agreements up until the coming into force of the CEAAct in 1995, but also of the movement towards harmonization that followed. Section 5.1 will therefore examine the implications of the groundbreaking court rulings in the cases of the Rafferty-Alameda and Oldman River dams and the related consequences of the heightened federal involvement in EIA. Section 5.2 will discuss the further development of the harmonization initiative through the failed Environmental Management Framework Agreement (EMFA), the CWA and the bilateral agreements associated with the latter in order to paint a clearer picture of how the two orders of government interact. Section 5.3 will offer relevant data on public opinion trends during these years and will attempt to reinforce the idea that intergovernmental considerations are a significant factor in explaining policy development. It will do so by building on the uneven degree of legislative and policy reform across the jurisdictions examined demonstrated in the previous chapter to show that the idea of six jurisdictions acting relatively independently of one another does not adequately explain all the evidence presented. Section 5.4 will offer conclusions concerning the impact of intergovernmental relations on the EIA processes of the jurisdictions examined.

5.1 Increased Federal Intervention

The key to examining the impact of federalism on the development of EIA policy since 1985 lies in the disruption of the traditional model of intergovernmental cooperation in EIA that existed before the late 1980s. While the federal government had announced in the 1987 Speech from the Throne that the EARPGO would be replaced with a legislated EIA process, the emphasis in cases where both Ottawa and a province would be involved remained on what Kennett (2000) describes as process substitution. This approach, illustrated well by the Canada-Alberta agreement (1986) which foreshadowed later intergovernmental agreements, was characterized by federal involvement in an EA only where there was, as Hodgins (1994) puts it: "…a clear and significant federal decision-making authority, i.e. projects initiated by a department of the federal government, projects on federal lands and projects involving significant federal funding" (p. 13).

Moreover, the main concern of the federal government at the time seems to have been "…reducing duplication of environmental assessment among federal and provincial agencies" (Environment Canada, 1987, p. 3). Such a focus, already discussed somewhat, was also adopted later by the Chrétien government. In the context of intergovernmental relations, several authors find it unsurprising that federal governments – regardless of their political affiliation – would strive for harmony in this policy area in order to make gains in other areas of greater priority; Trudeau in energy policy, Mulroney in seeking a constitutional amendment, Chrétien in demonstrating to Quebec that federalism works (Skogstad, 1986; Doern & Conway, 1994).

Beginning in 1989, however, a series of court rulings forced the federal government into a more assertive role. These cases, involving the Rafferty-Alameda dams in

Saskatchewan and the Oldman River dam in Alberta, not only resulted in an interpretation of the federal EARPGO as a binding requirement to perform EAs in areas well beyond what had previously been considered to fall within the Guidelines Order's scope, but also exposed the important fact that provincial EAs were not taking into account certain elements that a federal EA should encompass. In the following few years, the federal government would also suffer the embarrassment of having to conduct belated EAs even as the provinces refused to stop construction of the dams. The ensuing CEAA, and the federal refusal to accede to unanimous provincial demands for equivalency agreements, were to a large part shaped by the fallout from these cases.

5.1.1 The Rafferty-Alameda Dams

The process of construction of the Rafferty and Alameda dams revealed significant shortcomings in both the federal and provincial EIA processes and generated significant intergovernmental tension. As George Hood (1994) notes, Saskatchewan had neither devised any regulations for what was required in an EA nor ever formed a board of inquiry under its *Environmental Assessment Act*. Hood, who worked exclusively on the Rafferty-Alameda project from 1985 to 1991 as a high-ranking official in the Souris Basin Development Authority (SBDA), also details a conscious decision by the SBDA – the project proponent – to "…limit the involvement of the federal and Manitoba governments" (p. 66) for fear that the issue would get blown out of proportion. While the Saskatchewan government reached an agreement with neighbouring North Dakota, this lack of attention to transboundary effects became one of the key criticisms of the federal absence in the EIA process. In stark contrast to the idea presented above by the federal Department of the Environment only two years earlier that reduction of overlap of government processes was

of significant importance, the Federal Court in 1989 found that the federal and provincial processes and their requirements differed sufficiently to avoid unnecessary duplication (*Canadian Wildlife Federation and others v Minister of the Environment and Saskatchewan Water Corporation (Rafferty No. 1) [1989]).*

It is perhaps worthwhile here to take a slight detour and elaborate on the growing recognition of the need for consideration of transboundary effects in EIA. The potential significance of environmental effects in a neighbouring jurisdiction had been demonstrated by the 1967 W.A.C. Bennett dam in British Columbia, which had a variety of negative impacts in Alberta (*Toronto Star*, June 22nd, 1991). While Kennett (1995) is critical of the ultimate decision to leave the formation of a federal mediation or panel review of transboundary effects to the discretion of the Minister of the Environment – the CEAAct gives the Minister authority to do this when "…[he or she] is of the opinion that the project may cause significant adverse environmental effects in another province" [46(1)] – it can be argued that the very presence of such a clause makes it necessary for a province seeking to avoid federal involvement to pay some attention to neighbouring jurisdictions. Raymond Robinson, Chairman of what was then the Federal Environmental Assessment Review Office (FEARO), describes such a situation to the House of Commons Special Committee formed to study the eventual CEAAct (Oct. 4th, 1990):

> …in the present circumstance there frankly is virtually no recourse for the citizens or persons living in one province against the impacts of another, or indeed the government of one province in dealing with that issue. The federal government was anxious to establish a situation in which it could intervene in circumstances where those impacts would be likely to be serious … I will not deny the fact that certain provinces have been uneasy about what they see as an intrusion … But we feel that if that authority is effectively there, there is a high probability that it will rarely have to be used, that the pressure for the parties concerned to accommodate each other's concerns will be considerable, since we have, as we know, a longstanding and honoured tradition in this country of keeping the feds out at any cost.

Indeed, a Saskatchewan official pointed to an element of truth in this argument by stating: "We like to deal with it amongst ourselves … the provinces … but [the federal transboundary provisions] are a nice backstop" (Lechner, 2004). Conversely, an Alberta official noted: "It's in our best interests to deal with Saskatchewan one-on-one because they can petition the feds otherwise" (North, 2004).

Returning to the Rafferty-Alameda case itself, the ruling also greatly broadened the triggers for federal intervention. It was the position of the federal government that the EARPGO was a discretionary Order. The rulings by the Federal Court and the Federal Court of Appeal (*Canadian Wildlife Federation and others v Minister of the Environment and Saskatchewan Water Corporation (Rafferty No. 1) [1990])*, however, interpreted the key use of the word "shall" as a binding commitment. Such an interpretation of the EARPGO meant that federal EAs now had to be conducted in any situation where, for example, "[a] proposal … may have an environmental effect on an area of federal responsibility" [(6)]. This was not seen as a negative development by all elements of the federal government. Indeed, Raymond Robinson applauded the initial Federal Court decision, saying that the decision "…may turn us into a proactive agency instead of a passive agency" (*Globe & Mail*, April 17th, 1989). And the Ministers of the Environment around this time, especially Jean Charest, subsequently asserted a stronger role than that traditionally adopted by the Department. The federal government refused unanimous provincial demand for a clause in the CEAAct providing for equivalency agreements; a demand which had been accommodated in the 1988 *Canadian Environmental Protection Act*.

The source of this unusual federal stance can be found in the difficult situation the Ottawa now found itself. The provinces clearly resented the intrusion into areas of natural resource development by means of alternative elements of jurisdiction. The Alberta Forestry Minister argued that: "We fought hard for control of the resources in this province, and we're against the federal government coming into this process through the side door" (quoted in Harrison, 1996, p. 137). Even in Saskatchewan, where an official noted that relations with the federal government are generally good, it was a concern that: "They gave away natural resources in the 1930s … over time it appears that they're trying to find ways to get [them] back" (Lechner, 2004). Yet public concern for the environment was at a historic high, peaking in July 1989 when a Gallup Canada poll found it to be the issue of most concern to Canadians (Gallup Canada, July 31st, 1989). A subsequent poll (Gallup Canada, August 3rd, 1989) reported that 82% of Canadians believed their governments were not doing enough to protect the environment.

Given this heightened attention, any move by the federal government to back down could have resulted in significant political damage. Speaking specifically of the Department of Fisheries and Oceans (DFO), an Alberta official noted that, after the Rafferty-Alameda and Oldman River court decisions, DFO had two choices: "…they could either amend the Fisheries Act to devolve responsibility or hire people to do the job. So DFO got back in the habitat management business, because at the time, devolution was probably politically a bad move" (North, 2004). It was in this context that Lucien Bouchard, future founder of the Bloq Québécois, stated: "If there is a special role for the federal government, it is in the development of national environmental protection standards

and practices. The very nature of environmental problems demands this" (quoted in Harrison, 1996, p. 121).

The conflict which followed the Rafferty-Alameda rulings between Saskatchewan and Ottawa also resulted in a fair amount of embarrassment for the federal government. After the initial federal licence under the *International River Improvements Act* was held up by the Federal Court pending an EA, Environment Canada under Minister Bouchard produced and approved such a document without giving the public opportunity to review the final product. A further court case resulted in a denunciation of this action, with Justice Muldoon writing: "If there be anyone who ought scrupulously to conform to the official duties which the law casts upon him or her in the role of a high State official, it is a minister of the Crown" (*Canadian Wildlife Federation and others v Minister of the Environment and Saskatchewan Water Corporation (Rafferty No. 2) [1990]).* The Court ordered that an Environmental Assessment Panel be formed, but did not quash the licence because so much construction had already occurred. A subsequent agreement between the federal government and Saskatchewan to suspend construction fell apart after then-Environment Minister Robert de Cotret met with Premier Grant Devine and apparently authorized the SBDA to continue work but then subsequently claimed he did not (Hood, 1994). Either way, the result was the resignation of the entire Environmental Assessment Panel and a perception in the national media that Devine was being allowed to "…thumb his nose at Ottawa" while de Cotret remained "powerless" to do anything about it (*Toronto Star,* Nov. 17th, 1990). Hazell (1998) sees Section 51 of the CEAAct, which authorizes the passing of an injunction to stop construction of a project when a panel is formed under the Act's transboundary provisions, as a direct result of this incident. This need for the EIA process

to begin before construction was further reinforced by the events unfolding in Alberta at around the same time.

5.1.2 The Oldman River Dam

The legal and political disputes over the construction of the Oldman River dam in southern Alberta also resulted in significant federal-provincial tension, perhaps even greater than that produced in Saskatchewan because of Alberta's traditional sensitivity to perceived federal encroachment into natural resource policy and because this case was eventually decided by the Supreme Court of Canada. As previously mentioned, Alberta had an existing bilateral agreement with the federal government which essentially left the majority of EAs in the hands of the province. This desire to maintain control over a process that could have a significant impact on natural resource development is reflected by comparisons of the proposed CEAAct to the National Energy Program (*Alberta Report*, Feb. 19th, 1990) and by assurances from political leaders such as Premier Don Getty that "…we will not, will not, allow our jurisdiction to be invaded" (Alberta Hansard, June 19th, 1989). Alberta argued unsuccessfully before the Court that the EARPGO was *ultra vires* and that the federal government should be constrained to examine only matters associated with the legislation under which a federal licence was granted – in this case the *Navigable Waters Protection Act*. Tellingly, the federal government as a joint appellant and six other provinces as intervenors also supported the latter argument. One provincial argument eloquently stated that EAs were a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction" (*Friends of the Oldman River Society v Canada (Minister of Transport) [1992])*.

The courts also rejected assertions that no federal EA was required because a provincial review had already been conducted. Specifically, the Federal Court of Appeal ruled that the public had not been given the degree of opportunity for involvement in the process that a federal EA under the EARPGO would have allowed. Nor were the review panels as independent (*Friends of the Oldman River Society v Alberta (Minister of the Environment) [1988])*. While a variety of provincial studies conducted over the nearly 30 years a dam had been considered on the Oldman River included some public input, the lack of a single EIA process meant that this input was often gathered in a far less formal and rigorous manner than would be the case under one single process. And in some cases, as in the case of the issuing of the 1988 provincial licence under which the dam was eventually constructed, the requirements for public notice were waived altogether (Shpyth, 1991). In fact, when then-Premier Peter Lougheed announced that the province would go ahead with construction, no requirement was made for any EA under the *Land Surface and Reclamation Act* at all (*Edmonton Journal*, Jan. 24th, 1992). Project proponents merely argued that all of the studies previously conducted essentially amounted to an EA.

The presence of an Aboriginal reserve near the site of the dam seems a further strong basis for federal involvement. The Department of Indian and Northern Affairs did encourage a study of the possible impacts on the reserve and the province also provided funding to the Peigan tribe to conduct their own study of the possible effects of the construction (*Friends of the Oldman River Society v Canada (Minister of Transport) [1992])*. This did not, however, stop the federal Environmental Assessment Panel – appointed in late 1990 – from harshly condemning the provincial process:

> The Peigan were not treated fairly in the decision-making, planning or implementation phases of this project. The failure of the proponent and the Peigan to come to terms over

> this project is one of the most significant and unacceptable features of the project (FEARO, 1992, p. 5).

Despite the provincial funding, several Aboriginal groups intervened before the Supreme Court in favour of greater federal involvement and, as the later discussion of the James Bay II project as well as the CEAAct will show, many groups have remained committed to this position. Guarantees of Aboriginal involvement hold prominent positions in the CWA and its subsequent bilateral agreements and were generally cited as being of increasing concern by those officials interviewed. A BC official described it as "…the most important issue in EA today" (Crook, 2004). A CEAAgency regional official in Alberta noted a shift from the early 1990s when the provincial attitude was one of "Indian reserves are your problem … It's federal jurisdiction" to a recognition after several lost court cases that Aboriginal involvement had to be improved (MacDonald, 2004).

Like its counterpart in Saskatchewan, the case of the Oldman River dam made clear the need for early application of the EIA process as well as the need for injunctions to stop construction. By the time of the Supreme Court ruling, the dam was already complete and filled to 60% capacity (*Edmonton Journal*, Jan. 24th, 1992). Despite this, the aforementioned federal EA Panel (1992) made the startling recommendation that the dam be decommissioned. In addition to the lack of a formal EA and sufficient Aboriginal involvement, the Panel highlighted insufficient analysis of social and cultural impacts, lack of economic justification for the project and the fact that "…losses to the fishery resource caused by the project greatly outweigh any potential gains…" (p. 5) as reasons for their decision. Recognizing that such a recommendation was probably unfeasible – Alberta Deputy Premier Jim Horsman, in his announcement that the province would boycott the federal EARP, stated: "I'd like to know how anybody short of Superman could shut down

the dam" (*Toronto Star*, July 16th, 1991) - the Panel urged that a series of mitigation measures be attached as conditions for the granting of a licence, with the threat that failure to comply would lead to decommissioning.

Such a threat was hardly in accordance with the passive approach preferred by the federal government to this point. Nor was the federal intervention into the EA of the proposed Alberta-Pacific pulp mill on the Athabasca River. The Alberta Department of the Environment, now under Ralph Klein, found an ally in the Department of Federal and Intergovernmental Affairs, which pushed for passage of the proposed *Environmental Protection and Enhancement Act* as a way to weaken federal justification for intervention (Winfield, 1994). The growing debate over the James Bay II project would, however, test Ottawa's new stance.

5.1.3 The James Bay II Project

While this research does not directly examine the development of Quebec's EIA legislation, there is still value in observing the course of events concerning Phase Two of the large James Bay hydroelectric development following the Rafferty-Alameda and Oldman court decisions. Canadian federalism has to a significant extent been shaped by the 'Quebec factor;' not only the frequent demand for decentralization, but also the need to demonstrate to a large, politically mobilized linguistic minority that they can be accommodated within the Canadian federation. Considering that the late '80s and early '90s also witnessed attempts by Prime Minister Mulroney to get Quebec to sign onto the Constitution, one might expect that, if the federal government were to actively seek to avoid conflict with any province, it would be Quebec. Viewed from a different perspective, one might say that, if the federal government, led by a Prime Minister and three

consecutive Environment Ministers from Quebec, was willing to battle Quebec over the environment in the middle of this period of megaconstitutional politics, the other provinces could not have been particularly reassured.

Ottawa's position, however, fluctuated dramatically and reinforces the point that federal unilateralism in EIA is undertaken only reluctantly. The crux of the debate revolved around the Quebec government's desire to divide the environmental review into two stages, first considering the impacts of roads, airports and marine terminals and then analyzing the rest of the project. Since an estimated $600 million would have been spent by the time stage two of the review was undertaken, environmentalists were suspicious of whether cancellation of the project would be seriously considered (Harrison, 1996). Lucien Bouchard, now leader of the Bloq Québécois, nevertheless continued his support for federal intervention: "For the time being, Ottawa has powers and jurisdiction in the environment, and it might be that even some nationalists in Quebec must thank God for that, because Quebec is not taking care of the environment now" (*Montreal Gazette*, Oct, 30th, 1990). Indeed, Quebec Environment Minister Pierre Paradis broke ranks and argued first for a single review and then for a federal review under the James Bay Northern Quebec Agreement (JBNQA), which was believed to be more rigorous than the EARPGO because of the requirement for the Cree and Inuit to be co-signatories to the review (*Montreal Gazette*, Nov. 23rd, 1990). Unfortunately, Bouchard's successor as federal Environment Minister, Robert de Cotret, also changed his mind and accepted a two-stage review. His successor, Jean Charest, reversed course again and announced a full independent federal EA of the project (*Toronto Star*, July 18th, 1991).

One of the major reasons for this resort to unilateralism was the consistent opposition of the Cree in Northern Quebec to the project. Phase One of the James Bay project, completed in 1971, had had significant and wide-ranging environmental impacts despite assurances from the province that impacts would be limited, including destruction of habitat of a variety of species which led to depopulation of species on which the Cree depended to hunt (House of Commons, May 30th, 1989). Now, the Cree launched a legal action to force the federal government to apply their authority under the JBNQA. Once again the federal government stood with a province to argue that the EA was outside their jurisdiction and that any federal concerns could be incorporated into a provincial study. Justice Rouleau of the Federal Court, however, found many areas of federal jurisdiction that would be affected, including Indians and Indian lands, migratory birds, marine mammals and fisheries, and added that the actions of the two governments "…w[ere] intended both to appease and circumvent the native populations" and seemed to be "…attempt[s] to free themselves from the duties and responsibilities imposed under the [JBNQA]" (*Cree Regional Authority et al v Attorney-General of Quebec* [1991]). The eventual EA, prepared by Hydro-Quebec, was therefore submitted to three committees - two constituted under the JBNQA and one under the EARPGO - and was deemed inadequate by all three in late 1994. Revision of the EA was rendered unnecessary, however, when a lobby of environmentalists and Cree succeeded in convincing the governments of New York and Maine to cancel their contracts, effectively killing the project (Skogstad, 1996).

While hardly distinguishing itself as an enthusiastic participant, by 1992 the federal government was firmly entrenched in EIA. Six years prior, the emphasis had been on

process substitution through agreements such as the 1986 pact with Alberta and the avoidance of duplication. Increased public attention, peaking in July 1989, had encouraged the development of a legislated EIA process, but without the Rafferty-Alameda and Oldman River dam cases is it highly unlikely, given the tradition of federal deference, that events would have unfolded the same way. The courts had made it clear that, if a provincial process was to serve as a substitute for a federal EA, it must meet the requirements of the latter. This included an emphasis on transboundary effects and Aboriginal rights, both of which were seen as key concerns of a federal assessment. With such a firm legal backing, as well as high – though decreasing by 1991 – public concern, Ottawa had shown some uncharacteristic backbone: The perceived humiliation of de Cotret's inability to stop construction of the Rafferty-Alameda dams in Saskatchewan led to clauses in the CEAAct which strengthened the power of the Minister of the Environment; Charest abandoned the stance of his predecessor in favour of a unilateral federal EA over the James Bay II project; and the federal government rejected provincial calls for delegation of authority through equivalency agreements. Like it or not, Ottawa was now the holder of significantly more power in EIA and the provinces would have to deal with this new reality.

5.2 Harmonization and the Provincial Response

The tactics adopted by the provinces represent a shift from outright rejection of federal jurisdiction to an attempt to minimize federal involvement. The provincial recommendations for amendments to Bill C-78 submitted by BC Environment Minister John Reynolds (Provincial/Territorial Working Group, 1990) can be seen as such an attempt. Bill C-78 would die on the order paper but would be reintroduced and passed as

Bill C-13 in 1991. The provincial recommendations included the aforementioned equivalency agreements, under which the federal government could transfer an EA to a province where the processes were "equivalent and comparable," although the final decision would remain with the federal responsible authority [proposal H]. The provinces also recommended that procedures and requirements for joint review panels be decided on jointly by federal and provincial Ministers [proposal E] and that there be a cooperative scoping process under which the federal government would consult with a province when an EA is required [proposal G].

A variety of authors are skeptical of the effects of such a delegation of federal authority. Andrews and Hillyer (1990) of the West Coast Environmental Law Association, for example, express serious reservations about all three of these proposals, fearing that a jointly decided procedure for review panels could allow for deviation from the federal commitment to such things as funding for public participants, while a cooperative scoping process would allow provinces a formal say in federal EAs which require no provincial involvement. They also argue that the term "comparable" is meaningless and that equivalency agreements would force responsible authorities into making decisions based on information provided by organizations outside federal supervision or control. Hazell (1998) sees the potential for equivalency agreements to lead to "… the balkanization of environmental assessment in areas fully within federal constitutional authority" (p. 57). In any event, the only one of these recommendations to appear in the CEAAct is the proposal for joint requirements for a panel review. The CEAAct does state, however, that the members of the panel must be unbiased [41(b)] and that the public must be given an opportunity to participate [41(e)].

While the provinces enjoyed limited success in terms of influencing the federal legislation itself, the CCME offered a much better opportunity to restrain federal unilateralism. The CCME was created in 1988 out of the Canadian Council of Resource and Environment Ministers and focuses on "…promot[ing] effective intergovernmental cooperation and coordinated approaches to interjurisdictional issues" (CCME, 2004). Through its policy of revolving chairmanship and emphasis on developing mutually acceptable 'national' standards, the CCME attempts to cast itself as less of a federal-provincial-territorial entity than as of 13 jurisdictions working together. Its priorities are reflected well in the Statement of Intergovernmental Cooperation on Environmental Matters (STOIC) which emphasizes collaboration, partnership, information-sharing and a commitment to act on environmental matters while respecting each other's jurisdiction (CCME, 1991). Several authors, however, are highly critical of the CCME, with Harrison (1996) observing that Alberta and Quebec - whom one might think would take offence to an agreement which recognizes that "both the Parliament of Canada and the provincial legislatures have legislative authority enabling them to regulate matters relating to the environment" (CCME, 1991, p. 4) – were in fact strong proponents of the STOIC. The CCME norm of consensual decision-making, with every jurisdiction effectively holding a veto, seems a very good explanation for this support. By binding the federal government into a multilateral forum undesirable federal initiatives are perhaps easier to resist (Skogstad, 1994). Winfield (2002) is further skeptical of the actual goal of the harmonization initiative, noting that it occurred at a time when many provincial Environment Ministries were undergoing severe budget cuts, typically much more severe than Environment Canada. This feeling that environmental protection is occasionally

compromised to further intergovernmental harmony motivates much of the opposition to harmonization.

In the immediate aftermath of the Rafferty-Alameda and Oldman River court cases and the development of the CEAAct, the CCME approach to EIA was what Kennett (2002) describes as "process coordination." In contrast to the aforementioned contrasting idea of "process substitution," the Framework for Environmental Assessment Harmonization (CCME, 1992) allowed for bilateral agreements which coordinated aspects of the federal and provincial processes, such as timetables and joint panel reviews. Significantly, both processes remained unchanged under the agreements and any coordinated activity had to meet the legal requirements of both governments. This meant that if the two processes were not compatible at some steps, they would remain uncoordinated. Kennett (2002) notes that the federal comprehensive study stage, which may add three months to the EIA process, has no parallel in Alberta. Under the process coordination model, the federal EA would therefore diverge from the provincial process if a comprehensive study was seen as necessary. In addition to the 1993 agreement with Alberta, the federal government signed two other bilateral agreements under the Framework: with Manitoba in 1994; and with British Columbia in 1997. Hazell (1998) sees the agreements as a step forward for the federal government because of their recognition of both federal and provincial jurisdiction in EIA: "…in a sense, the federal and respective provincial governments are equal and are treated as equals…" (p. 94). He is, however, critical of the later *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (1997) because it allowed the federal government to delegate a screening or a comprehensive study to the province [7].

In this sense, it resembled the process substitution model adopted in the negotiations over the CWA going on at that time.

Arguments in favour of harmonization through process substitution almost inevitably focus on the elimination of unnecessary duplication. Indeed, this was the predominant concern about increased federal involvement expressed by all provincial environment officials interviewed and should serve to reinforce once again the strong link between environmental protection and economic development at the provincial level. In the words of one provincial official: "They're duplicating what we've done for 30 years" (Crook, 2004); according to another: "The biggest issue is timing … [Federal approval processes] are often 30 days behind the provincial process" (Lechner, 2004). Such arguments are indicative of a provincial concern that has been apparent at least since 1990. Appearing at that time before the House of Commons Committee to Pre-Study Bill C-78, Environment Minister John Reynolds of BC warned that the recent federal intervention was leading to "…a sense of instability which is especially disturbing at a time when we face a downturn in the economy" and that "[i]ndustry is coming to a standstill in Canada because of some of our processes … the situation is so wide open now that anybody can go to court and delay things for months and months" (House of Commons, Dec. 4th, 1990). This position was reaffirmed a decade later when another Provincial/Territorial Working Group (2000) compiled a list of projects which they judged had been needlessly delayed through late federal intervention or duplication to meet overlapping federal and provincial standards.

Others, however, have questioned the severity of the problems of overlap and timing. A CEAAgency official acknowledged the existence of a problem but stated:

"…you have to look at the perspective it's coming from." The official commented on the existence of groups whose sole purpose was to guide companies through the EIA process as efficiently and cost-effectively as possible and who were capable of exerting a significant amount of pressure on provincial contacts. Meanwhile, the official stated that, in many Alberta oilsands projects, the proponent was often either unwilling to disclose their entire mine plan or did not provide detailed enough information, which meant that the federal process either had to incorporate previously unforeseen considerations or that a federal Department would have to conduct supplementary information gathering. Finally, the official argued: "The companies make a song and dance about how oil drives the Alberta economy and we know that," but that CEAAact standards needed to be adhered to (MacDonald, 2004). This relationship between provincial governments and industry has been seized upon by a significant portion of the environmental community as a sign that the former are too closely tied to economic development (Burgess, 2004).

Gibson (2002) further notes that the federal process often considers aspects left unaddressed by the provincial process. To return to Alberta for a relevant example, the Alberta Environmental Appeal Board (2003) decision concerning projects proposed by Inland Aggregates Ltd. and Lafarge Canada Inc. was criticized by environmental groups because licences were granted under the EPEA without the opportunity for referral to a public panel – something available for all projects covered by the CEAAct (MacDonald, 2004). This consistency of application across the country was also cited as a strength of the federal process by a national CEAAgency official (Burgess, 2004).

As the court rulings of the early 1990s made clear that a provincial process which did not fulfill the requirements of a federal EA could not be considered its substitute, the

provinces began pointing to their respective initiatives in EIA as a sign that equivalency was possible. Alberta Environment Minister Ralph Klein appeared on behalf of the CCME and condemned the federal rejection of the provincial cooperative scoping and equivalency agreement proposals described above. Noting that the CCME was concerned over possible federal intrusion into decision-making concerning provincial natural resources, Klein stated: "The provinces are now putting in place processes that would be equivalent or perhaps even better than the processes proposed by the federal government, and that ought to be recognized" (House of Commons, Nov. 19th, 1991). Klein also recommended that the judge of what is "equivalent" be the CCME. During the five-year review of the CEAAct, the provinces continued to ask for equivalency agreements and for a legislative provision allowing for "…the exemption of the application of the CEAA, aspects of CEAA or issues already addressed by other processes" (Provincial/Territorial Working Group, 2000, 'Recommendations Report,' p. 8). The basis for these and other requests was that:

> [t]he provinces and territories have made substantial advances in the practice of environmental assessment in their respective jurisdictions since CEAA was first enacted … adjustments to CEAA are required to recognize and accommodate the improvements to provincial environmental assessment legislation and practice… (Provincial/Territorial Working Group, 2000, 'Trends in Environmental Assessment,' p. 28).

Provincial concern over the impact of increased federal involvement occasionally manifested itself in an explicit linkage between federal actions and provincial reforms. This was most apparent in British Columbia and Alberta. In the case of the former, an official argued that the court cases that contributed to a heightened presence around 1990 did not adequately consider the constitutional separation of powers between the governments. This official acknowledged that this heightened presence was "clearly a major factor" behind the four-year process that resulted in the 1995 BCEAA and helped

jumpstart what had been a failed attempt to streamline the three EIA processes in place in 1990 (Crook, 2004). In the case of the latter, a federal regional official believed that: "Alberta so jealously guards its jurisdiction that … it's driven Alberta to actually have much better standards. If nothing else, I think they keep one step ahead of everybody else for that reason" (MacDonald, 2004). This certainly fits in with Winfield's (1994) findings, mentioned above, of collaboration between the Ministry of Federal and Intergovernmental Affairs and Alberta Environment to develop the EPEA.

A different attitude towards on this issue was evident in the other three provinces examined. Jurisdictional infringement was not seen as a significant problem by either the official from Saskatchewan or Manitoba and both emphasized the positive overall nature of their dealings with the federal government. Apart from the desirability of having federal transboundary provisions to serve as a back-up in case their interests are overlooked by neighbouring provinces (Lechner, 2004), which was discussed above, both officials referred positively to joint committees which operate with federal participation. In the case of Manitoba, it was indicated that greater federal involvement has actually helped the province develop a stronger cumulative effects assessment process because of the addition of CEAAgency resources (confidential interview, 2004). Ontario reported considerable concern over both overlap and jurisdictional infringement, but did not attribute any of its reforms to federal action (Ireland & Macchione, 2004).

While concern over overlap and, in some cases, jurisdiction seem to be a key factor in explaining provincial support for harmonization, federal support seems once again tied to a desire not to aggravate intergovernmental relations. Perhaps seeking to capitalize on this desire, the Provincial/Territorial Working Group (2000) remarks that acceptance of its

recommendations: "…has the capacity to demonstrate that federalism works" ('Recommendations Report,' p. 5). In 1993, therefore, despite the previous arrangements under the Framework for Environmental Assessment Harmonization, the CCME was charged with negotiating a new harmonization agreement. It soon announced an initiative with the top priority of: "clarifying federal-provincial roles and responsibilities; elimination of duplication and overlap; and harmonization of legislation, regulations and policies" (CCME, 1993). As a perhaps simplistic example of the participants' focus, Theme One of the report was "Enhancing Cooperation Amongst Governments" while "Managing Environmental Issues" came later as Theme Two (CCME, 1993). Several authors argue that achieving environmental harmony only became more prominent under the Chrétien government, especially following the 1995 Quebec referendum when demonstrating that federalism works became tied to a program of non-constitutional renewal (Winfield, 2002; Fafard, 1997). Harrison (2002a) describes the pressure from the Prime Minister's Office and from the Minister of Intergovernmental Affairs, Stéphane Dion, around this time to get a deal done.

The eventual deal – the CWA, signed in January 1998 by all Canadian governments except Quebec – has been criticized by some for permitting the federal government to abdicate some of its responsibility over environmental policy. Indeed, this criticism helped undo the CWA's predecessor, the EMFA, which was abandoned after public consultations in January 1996. What is of greatest relevance here is the accompanying Sub-Agreement on Environmental Assessment (SAEA) and the subsequent bilateral agreements between Ottawa and the four western provinces. In contrast to the earlier Framework for Environmental Assessment Harmonization, the SAEA adopts a process substitution

approach for projects that require more than one assessment. The goal of the SAEA is to ensure that only one EIA process be applied to a project.

The bilateral agreements ensure coverage of the areas which the courts had focused on in the court cases of the early 1990s. All four of the agreements – with Alberta (*Canada-Alberta Agreement for Environmental Assessment Cooperation, 1999*), Saskatchewan (*Canada-Saskatchewan Agreement for Environmental Assessment Cooperation*, 1999), Manitoba (*Canada-Manitoba Agreement for Environmental Assessment Cooperation*, 2000) and BC (*Canada-British Columbia Draft Agreement for Environmental Assessment Cooperation*, 2003) – make explicit commitments that other jurisdictions potentially subject to transboundary effects will be invited to participate in the EA and that affected Aboriginal groups will be similarly invited. The Agreement with BC (2003) is the most detailed concerning transboundary effects, providing for the early exchange of information if the federal government feels that the transboundary provisions in the CEAA may apply to an EA [32]. In terms of Aboriginal involvement, the Agreement with Alberta (1999) goes beyond a simple commitment to allow participation, specifying that this will include:

> opportunity to participate in a consultation program for the preparation of the environmental assessment report, to provide written comments at the appropriate stage of the environmental assessment, and to appear at a public hearing if one is convened [12.1].

Each agreement also details the requirements for public involvement and for the legal requirements of both jurisdictions to be met. Those officials interviewed almost unanimously specified the clarifying of roles and responsibilities as the major incentive behind the bilateral agreements, although a federal official agreed that the relatively more detailed Canada-Alberta agreement (1999) was a reflection of the strength of Alberta's EIA process (MacDonald, 2004).

One of the more controversial elements of this plan is that there be a lead party who administers the EA in accordance with their process. While the other parties are consulted and retain their decision-making authority, it is the lead party who establishes timelines, gathers information and decides which environmental effects need to be incorporated in the EA for all parties to make their respective decisions [5.7.0]. It should be noted, however, that both the SAEA and all bilateral agreements require that a definition of "environmental effects" that meet the definitions of both the federal and provincial governments involved be adopted and the CWA states:

> nothing in this Accord alters the legislative or other authority of the governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada [9].

Nevertheless, there have been concerns expressed that the SAEA and the bilateral agreements mean a decreased federal presence due to the role of the lead party. The federal government is only automatically the lead party when the proposed project is on federal lands. Otherwise, the lead party is the province or territory if it is within their boundaries. There are, however, a series of "best-situated" criteria that may alter who is appointed lead party. The criteria include "scale, scope and nature of the environmental assessment," "physical proximity of the government's infrastructure," "ability to address client or local needs" and "interprovincial, interterritorial or international considerations" [5.6.4]. Kennett (2002) believes this clause will lead to even fewer situations in which a federal Department is the lead party. In the interviews conducted, there was not a single case offered where there had been a federal lead party since the signing of a bilateral agreement.

For critics of this arrangement, the situation is exacerbated by the lack of oversight or enforcement provisions. Originally, there had been agreement to develop Canada-wide

standards for the content of an EA as well as accountability mechanisms to ensure that the legal requirements of all processes involved in an EA were met (CCME, 1996). Neither have come into being. An Alberta official commented that discussions relating to the former stalled because the federal proposal was based on the CEAAct model, which differed significantly from the provincial processes in some areas (North, 2004). When asked during a hearing of the Standing Committee on the Environment and Sustainable Development (SCESD) why no enforcement provisions were included in the CWA, Ian Glen, then-Deputy Minister of Environment Canada, attributed it to "political" reasons, stating that enforcement was seen as less of a priority (House of Commons, Oct. 20th, 1997).

The SAEA further contains a curious clause that states: "The Parties agree to seek to amend their legislation and/or assessment processes as necessary to comply with their obligations under the terms of this Sub-agreement" [5.12.0]. What this means exactly is not quite clear. Sid Gershberg, then-President of the CEAAgency, testified before the SCESD that no changes to the CEAA would be necessary (House of Commons, Oct. 20th, 1997). The amended 2003 *Canadian Environmental Assessment Act* adds as one of its purposes: "to promote cooperation and coordinated action between federal and provincial governments…" [4(2)(b.2)], though the effect of this clause is also unclear. The eventual SCESD report (House of Commons, 1997) recommended an explicit provision in the SAEA confirming that no amendment to the CEAAct was required, but this did not occur. One possible explanation is that, given the emphasis by the Provincial/Territorial Working Group (2000) on avoiding legal challenges, this clause serves as an attempt to minimize

situations in which two governments can be forced into conducting separate assessments by a court ruling.

The SCESC report (House of Commons, 1997) is also critical of several other aspects of the CWA. The SCESC finds insufficient evidence of overlap to merit its key role in the Accord, noting instead that greater emphasis should be placed on identifying areas where there is not enough coverage under Canada's EIA processes as well as ensuring that application of the CWA does not compromise this coverage. And while the Deputy Minister of Environment Canada argued that no devolution would occur as a result of the Accord, the Committee remains unconvinced, seeing the CWA as potentially leading to the surrender of a significant number of important federal powers in EIA. It should be noted that, based on the interviews conducted, no significant devolution of authority has been detected. In the case of Aboriginal involvement, for example, the federal Responsible Authority must still examine proposals for possible violations of treaty rights and has the authority to conduct a consultation process entirely separate from the EA if needed (Burgess, 2004).

The pattern that can therefore be observed throughout the 1990s is one of a return to intergovernmental harmony through agreements that are less conducive to federal unilateralism. While agreements earlier in the decade, such as the Framework for Environmental Assessment Harmonization (CCME, 1992) were structured around coordinating two different EIA processes where possible, the later CWA and the SAEA aim at eliminating one process entirely. The focus of the latter agreements on eliminating duplication, despite a persistent debate about how much of it actually exists, reaffirms the importance Canadian governments place on cooperation. As has been seen, the motives

behind support for cooperation vary; with the provinces motivated by concerns over overlap and, to a varying extent, jurisdiction while the federal position has often been tied to the larger political goal of reducing intergovernmental conflict.

A key argument by both governments has been that this cooperation will not come at the price of environmental protection. Provincially, both Klein's arguments on behalf of the CCME before the Legislative Committee on Bill C-13 (House of Commons, Nov. 19th, 1991) and the Provincial/Territorial Working Group's (2000) recommendations for reform to the CEAAct emphasized that improvements to provincial EIA processes deserved to be recognized. As was discussed above, officials in both BC and Alberta suggested that the increased federal involvement since 1990 was a significant reason for such improvements. It is with the hope of elaborating on this theme that trends in public opinion around 1990 will now be examined.

5.3 Trends in Public Opinion

Having argued that federal actions have an important, if varying, effect on the development of provincial EIA processes, it is necessary to consider the possibility that these developments can be explained in an alternative fashion. One such argument which seems especially plausible would be that the different orders of government respond independently to similar pressure from public opinion. Such a conclusion would provide strong support for advocates of a more collaborative approach to Canadian federalism, since conflict is largely redundant and only inhibits the implementation of the separate processes. As will be seen, however, public opinion data from around 1990 does not adequately support such an assertion. Ultimately, these results further support the conclusion arrived at in the previous section.

Measuring concern for the environment can be gauged by public response to two questions: how concerned people are when directly asked about the environment; and how many people list the environment as their most important concern. Doern and Conway (1994) state that Decima Research polls conducted for the federal government in 1985 indicated that citizens were increasingly concerned about environmental issues when directly asked to rate their level of concern. Gallup Canada polls note a rising concern about pollution, but do not ask specifically about 'environment' until 1988. Figure 5.1 tracks the percentage of people who responded that they were "very concerned" about the environment. It should be noted that, from 1975 to 1987, the average percentage of respondents who regarded pollution as being a "very serious" problem was around 52% (Gallup Canada, June 1st, 1987). The five years from 1987 to 1992, then, witnessed a significant rise in public concern, which at its peak resulted in nearly 80% of respondents seeing environmental degradation as a very serious problem, before tapering off and returning to lower levels after 1992.

Figure 5.2 adds in the regional breakdown of respondents. While Ontario, British Columbia and the Prairies each experienced an overall rise in public concern during this period, the results raise several questions. On the basis of these results alone, one might expect that Ontario – which regularly exceeds the national average in terms of the percentage of respondents who are "very concerned" about the environment – to be at the forefront of reform in EIA. Yet, although the Ministry of the Environment formed a task force to recommend changes to the EIA process, it was not until 1996 that the OEAA was amended. And as previously mentioned, this 1996 amendment – with its focus on greater efficiency – has been criticized as a step in the wrong direction (Valiante, 1996).

Figure 5.1: Concern about the environment 1987-1992

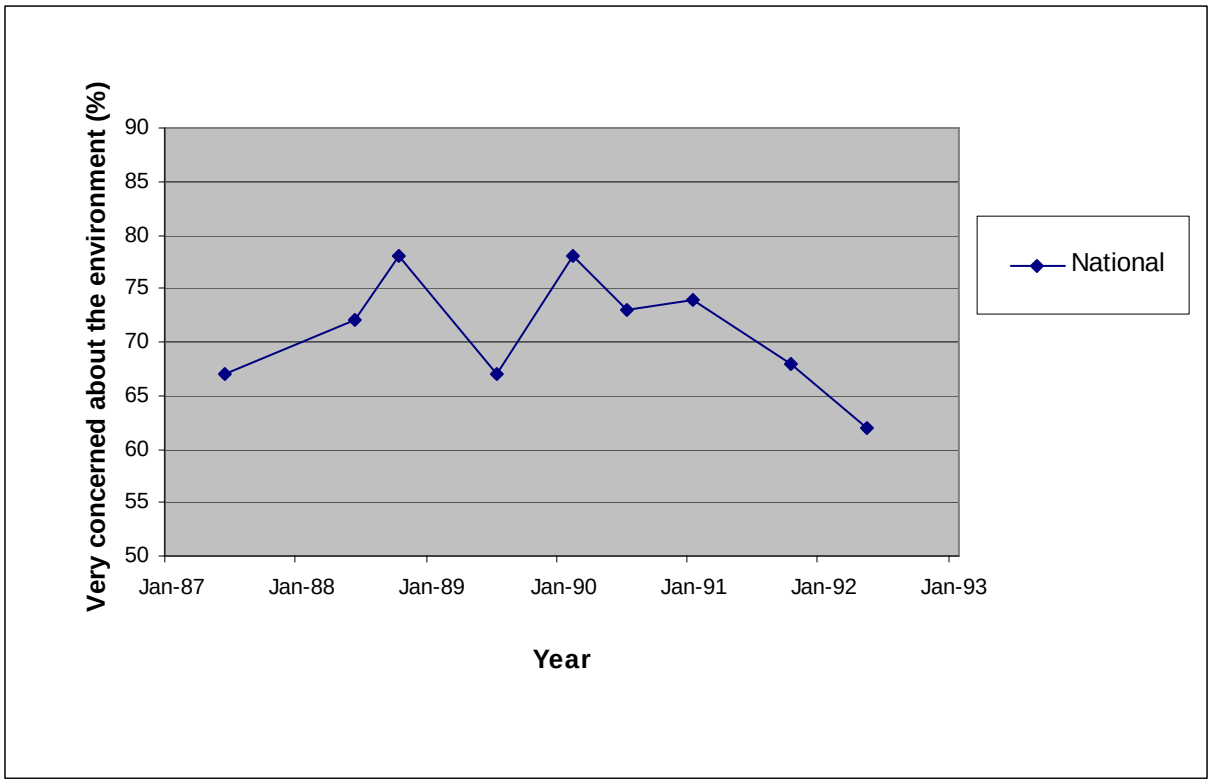
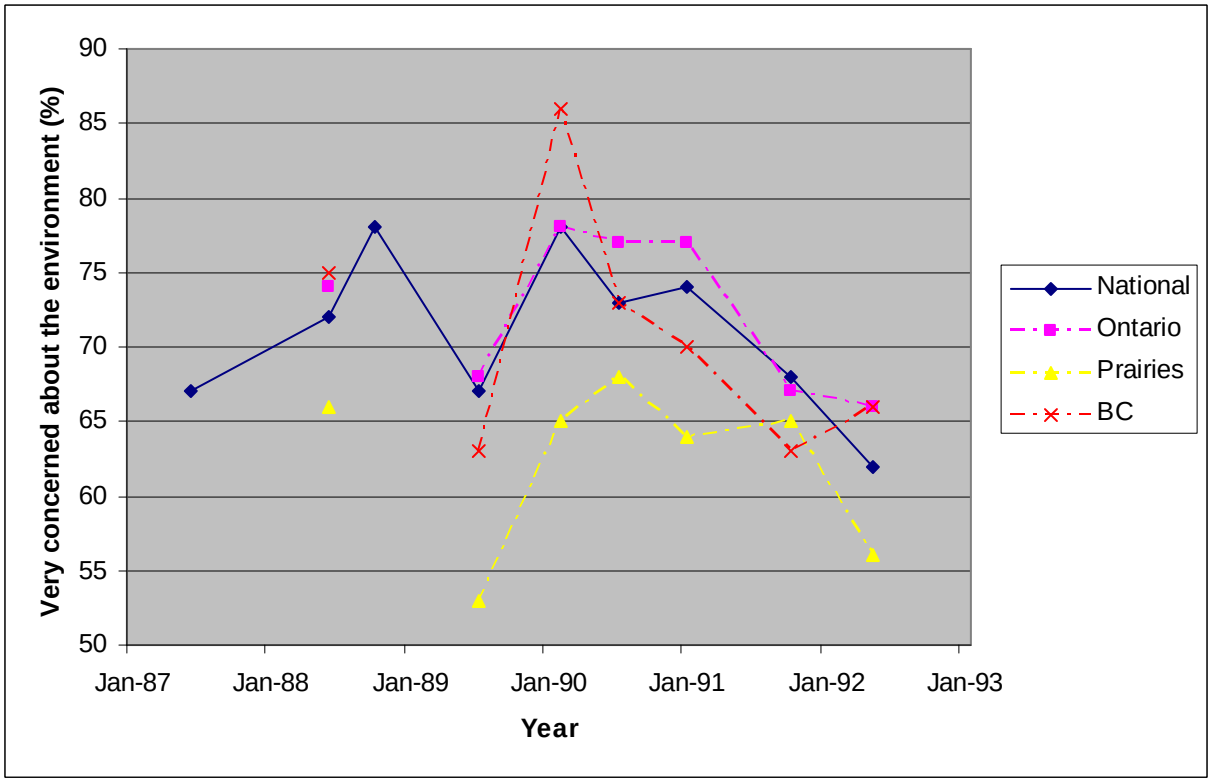


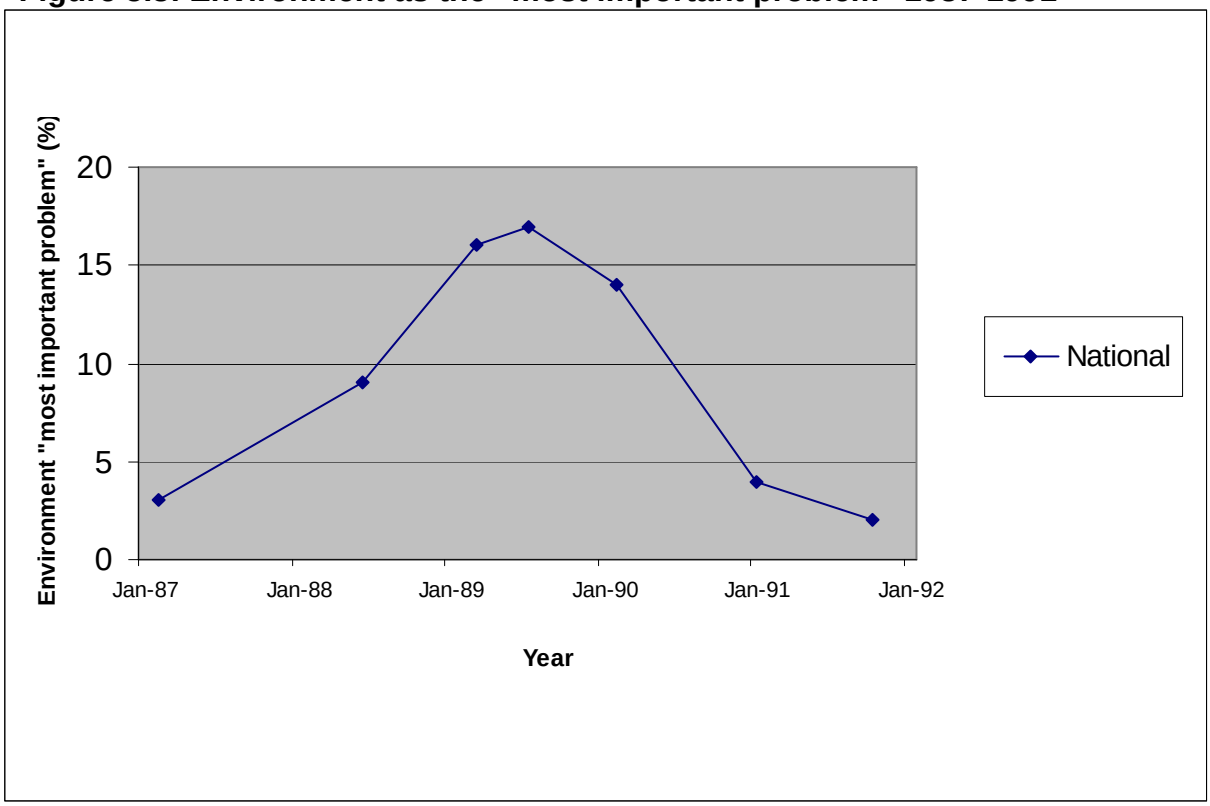
Figure 5.2: Concern about the environment by region 1987-1992



Conversely, while it is unfortunate that Gallup Canada chooses to lump together Alberta, Saskatchewan and Manitoba as the "Prairies," someone looking at these results might be surprised to learn how quickly Alberta acted in the wake of the Rafferty-Alameda and Oldman River decisions. The relatively high stringency of the ensuing EPEA also stands in marked contrast to the consistently lower concern expressed here by Prairie respondents. British Columbia's MPRP and MDAA could be attributed to increased public concern, although BC respondents' level of concern is certainly the most erratic of the three regions. The relatively stringent BCEAA, however, only came into force in 1995.

While Gallup Canada is sadly short of regional breakdowns detailing the percentage of people who cited the environment as "the most important problem facing this country today," what information is available suggests a similar pattern as described above. Prior to 1987, the number of people choosing the environment as "the most important problem" was not even 1% (Gallup Canada, Jan. 14th, 1991). Figure 5.3 illustrates how this rate peaked at 17% in July 1989, surpassing unemployment for the only time in Canadian history, before descending to its more traditional total of 2% in late 1991. In June 1988, when the national average stood at 8%, the regional averages were as follows: Ontario, 12%; Prairies, 3%; BC, 2%. And again in March 1989, when the national average was 16% the regional averages were: Ontario, 16%; Prairies, 10%; BC, 17%. As with concern over the environment, therefore, each region did experience an increase in the importance respondents attributed to environmental issues. However, if EIA reform in the provinces occurs independently of federal reform, then one might expect the pace and breadth of reform to be determined by the extent of public concern. This would not be an accurate measure of what really occurred.

Figure 5.3: Environment as the "most important problem" 1987-1991



It is also interesting to note how short-lived heightened public concern proved. Figures 5.1 and 5.3 both show that national public concern was only trending upward or remaining level for two or three years. Indeed, by the time of the Oldman River dam Supreme Court ruling in 1992, public concern was rapidly returning to more traditional levels. Many reform processes were initiated in these three years, but there has been some suggestion that government officials felt the degree of public concern was overblown. de Loë (1999), for example, argues that by 1987 the Alberta government was increasingly dismissive of negative media coverage of the Oldman River dam as unrepresentative of public opinion.

5.4 Conclusion

This chapter aimed at exploring political and legal developments since the late 1980s in an attempt to determine the evolution of intergovernmental relations in EIA and the role of increased federal involvement in the legislative and policy changes at the provincial level. Section 5.1 described the series of court cases that surrounded the construction of the Rafferty-Alameda and Oldman River dams as well as the James Bay II hydroelectric project. In each case, the courts emphasized areas in which the provincial EIA process was deficient in meeting federal obligations, whether it be transboundary effects or Aboriginal or public involvement. The net result was that the federal government – albeit unwillingly – began to conduct a much larger number of EAs. At the same time, the development process of the CEAAct took on a great deal more significance, especially with Ottawa's rejection of collaborative scoping and equivalency agreements.

As section 5.2 described, the assertion of federal authority disrupted the existing order in EIA where the federal government played a largely supporting role. The provincial response, in effect, took place at two levels: first, at the multilateral level – either interprovincially or in negotiations with the federal government; and second, at the individual provincial level. At the multilateral level, the provincial response was to deviate from their previous position of outright rejection of federal jurisdiction to a position of reemphasizing the importance of elimination of duplication and overlap. The ensuing revitalization of the CCME led to an emphasis on harmonization that initially resulted in bilateral agreements stressing coordination between the federal and provincial processes. During the mid-1990s, however, under a federal government committed to demonstrating that Canadian federalism could work, the signing of the CWA and its accompanying SAEA

changed the focus back to pre-1990s process substitution. Throughout this period, and again during the five-year review of the CEAA in 2000, the provinces argued for process substitution and equivalency as recognition of their reforms in EIA. At the provincial level, concern about federal involvement seems to have played an important role in the development of the more stringent BCEAA and EPEA in British Columbia and Alberta respectively. In Saskatchewan and Manitoba, however, where no new legislation has been enacted since the 1980s, concern about federal involvement seemed less prominent. Indeed, several positive aspects of this involvement were noted. In Ontario, concern about overlap and jurisdictional infringement certainly rivaled concerns in the two westernmost provinces, this does not appear to have translated into legislative or policy reform.

Combined with the regional breakdown of public opinion trends provided in section 5.3, then, the evidence presented seems to indicate an important yet varying role for federalism in explaining the development of the EIA processes examined. The fact that public concern for the environment was consistently lowest in the Prairie provinces is certainly not reflected in the early and aggressive reforms made by the Alberta government. At the same time, Saskatchewan and Manitoba seemed to have developed a strong working relationship with the federal government which has strengthened the EIA process when both governments are involved without significant provincial reform. The implications of these differences will be further examined in the following chapter.

Chapter 6: Discussion and Conclusion

Environmental impact assessment and the broader commitment to some sort of sustainable development that it represents are now entrenched along with federalism as factors in the way Canada operates. The objective of this research was to explore the relationship between the two by looking at a period of high activity in EIA reform. It has done so with the hypothesis that the increased level of federal involvement at this time contributed to the corresponding increases in stringency in provincial EIA processes. Chapter 2 described how the relevant literature surrounding such a hypothesis can be categorized in terms of two broad debates: whether collaboration or competition is the ideal intergovernmental relationship in a policy area with divided jurisdiction; and whether centralization or decentralization will allow for more stringent environmental protection. EIA, as one of the highest-profile environmental sources of intergovernmental conflict in the last 20 years, offered the opportunity to examine the consequences of this lack of clarity. Chapter 4, then, studied the reforms to the EIA processes of the federal government and the five western provinces undertaken from 1985-1995 and attempted to judge when and where there were increases in the stringency of the processes. Chapter 5 covered events during these years as well, this time focusing on the Rafferty-Alameda, Oldman River and James Bay II court cases, but also expanded its coverage by discussing the harmonization initiatives of the following years. The consequences of these cases and the responses from both orders of government were discussed, as were the differences in provincial responses to the greater federal involvement in EIA.

The framework introduced in Chapter 3 can now be used to draw several conclusions from the evidence presented. Within the overall two-step process of

determining whether there has been a widespread movement towards EIA reform since the late 1980s and then determining what role intergovernmental interaction played in this process, a variety of questions presented themselves. Under the former, this research asked: which jurisdictions had a more stringent EIA process in 1995 than they had a decade earlier? Were there specific areas of the EIA process that received attention from many or all of the jurisdictions during this period of reform? Were the majority of EIA reforms initiated when public concern was trending upward or at its peak? Were any reforms initiated when public concern was trending downward or after it had returned to normal levels? Under the latter, this research asked: did the court cases around 1990 result in a change in the intergovernmental method of addressing EAs where both orders of government were involved? If so, what were the federal and provincial responses to this change? Was there variation in responses across the provinces? Was there a noticeable linking on the part of the provinces between increased stringency in EIA processes and a more limited federal role? Finally, the answers to these questions will be used to reflect on the two broad debates of conflict versus collaboration and centralization versus decentralization in this policy area.

6.1 EIA Reform in Canada

While there was a widespread movement towards EIA reform during this period, the eventual outcomes were significantly varied across the jurisdictions examined. The most dramatic increase in stringency was likely in Alberta, where the LSCRA, which the provincial government had not even felt the need to apply to the Oldman River dam, gave way to the EPEA, whose commitment to sustainability and decision-making mechanisms rank highest amongst all EIA processes addressed in terms of stringency. The federal

government is certainly also noteworthy for its activity during this period, with the CEAAct itself being completed by 1992, but not being proclaimed until 1995 because of debate over its accompanying regulations. British Columbia, meanwhile, acted the earliest in this period in terms of actually creating new processes, consolidating a variety of procedures into the MPRP and instituting the MDAA. Considering that the latter never had any supplementary regulations passed, these can be seen as mere interim reforms before the BCEAA became law in 1995. By the standards put forward in this research, the EPEA and the BCEAA compete as the most stringent overall EIA processes in Canada. By contrast, the other three jurisdictions – Saskatchewan, Manitoba and Ontario – did very little in terms of amendments or regulations. This must be qualified by noting that these three jurisdictions already had legislated EIA processes; indeed, Manitoba's was only enacted in 1987 and relevant regulations therefore were passed in the years after. Saskatchewan created guidelines to deal with the Rafferty-Alameda EA, but the SEAA was certainly the least stringent of any EIA legislation by 1995. Ontario, meanwhile, undertook an examination of the OEAA but changed only one aspect of the legislation, allowing the Environment Minister to require an EA of a private undertaking.

Despite the differences in the extent of the reforms instituted, it is rewarding to identify commonalities in changes made. One of the more significant criticisms of EIA processes to emerge in the early 1990s was the need for early identification of projects that would require an EA and early application of the process. The fact that all jurisdictions examined had legislation devoted explicitly to EIA with generally clearer trigger mechanisms than before should therefore not be underestimated. In addition, the newer pieces of legislation generally contained more stringent clauses concerning cumulative

effects, consideration of alternatives and effects and compliance monitoring. Public participation clauses were given greater emphasis, with British Columbia and Manitoba having the most stringent such clauses.

Of particular interest, however, is the fact that all jurisdictions analyzed with the exception of Saskatchewan made some sort of addition to their transboundary provisions during these ten years. Indeed, it is possible to be more specific and note that all of the provincial additions occurred from 1990 to 1994. Chapter 2 introduced this concept and listed the prevention of interprovincial spillovers such as environmentally harmful effects as an argument in favour of centralization. And indeed the examination of transboundary effects has remained a consistent argument of advocates in favour of a greater federal role in EIA. As discussed in Chapter 5, the possibility of environmentally adverse effects from the construction of the Rafferty-Alameda dams occurring in Manitoba became a significant issue because Manitoba's involvement in the EA had been limited. By 1993, British Columbia and Alberta had created new processes with explicit transboundary provisions while Manitoba and Ontario had amended their existing legislation. This concern for ensuring that the interests of all affected jurisdictions are incorporated into an EA is also visible in the harmonization agreements signed later in the decade. In each case, the agreement guarantees that any possible transboundary effects will be dealt with by inviting the affected government to participate in the assessment process.

Aboriginal involvement saw a similar increase in prominence in the early 1990s. In both the Oldman River and James Bay II cases, the federal and provincial governments were criticized for neglecting Aboriginal issues. Unlike in the case of transboundary effects, however, the following years did not see a widespread movement to add clauses

guaranteeing Aboriginal involvement. Only the federal government and British Columbia include such clauses in their legislation. The harmonization agreements are a different story. All of them make an explicit commitment to Aboriginal involvement and also state that the agreement may be altered by future land claim or self-government agreements. This point will be elaborated on in the following section.

The fact that the Rafferty-Alameda, Oldman River and James Bay II court cases all occurred in the middle of heightened public concern over the environment blurs the causal links between increased federal involvement, public opinion and policy outcomes. Superficially, there appears to be significant value in surveying the chosen jurisdictions and contrasting the timing of the various reforms with the public opinion trends described in Chapter 5. Returning to Figures 5.1 and 5.3 it is obvious that by 1988, certainly, concern at the national level was notably high and trending upward. By 1992, concern was significantly down and falling towards more traditional levels. The federal government announced in 1987 that it would seek to establish a legislated EIA process, which fits the image of a government responding to increased public concern. As mentioned above, all provincial governments examined in this research also undertook some sort of reform process during these peak years. Yet the significant differences between the degree of legislative and policy reform amongst the provinces do not fit comfortably with the regional breakdown of public opinion trends presented alongside the national totals. Other factors seem to have been at work.

Before turning directly to the role of federalism in EIA since the late 1980s, it is worthwhile to speak to the significance of the abovementioned court cases on the federal EIA process. Chapters 2, 4 and 5 all touched on the tradition of federal deference in

Canadian environmental policy. Chapter 2 described the institutional barriers that have often made the development of environmental policy difficult. While many of these barriers extended to both orders of government, the federal government has traditionally been further constrained by an unclear constitutional base and a desire to maintain intergovernmental harmony. Chapter 4 described how the application of the federal EARPGO was considered discretionary until the Federal Court's decision over the Rafferty-Alameda dam; a position the federal government joined with the provinces in asserting on several occasions. Thus the EARPGO was not applied to projects such as the Oldman River dam despite the later findings of the courts and the federal Environmental Assessment Panel that the standards of public participation under the federal process had not been met by Alberta. Chapter 5 noted that Environment Canada's focus in 1987 was on avoiding duplication, with the 1986 agreement with Alberta serving as a good example of the process substitution model used to achieve this end. Chapter 5 also explained how the tougher enforcement provisions of the CEAAct can be seen as a consequence of the embarrassment suffered by the federal government due to its inability to stop construction of the Rafferty-Alameda dams. And this chapter has already commented on the prominence given to transboundary effects and Aboriginal involvement by the court cases.

When taken together, it is possible to speculate that, without these legal rulings after the federal government had committed to a legislated EIA process, the CEAAct could have had a much more discretionary trigger mechanism, less stringent enforcement provisions (which are hardly a strength of the CEAAct anyway), less of a focus on transboundary effects and Aboriginal involvement and perhaps clauses explicitly permitting equivalency agreements and collaborative scoping. While the downside of having many of these less

stringent measures in place was discussed in Chapter 4, it is much more contentious to say that equivalency agreements and collaborative scoping are undesirable. To defend this assertion, it is necessary to revisit the subject of intergovernmental interaction in this policy area.

6.2 The Role of Federalism in EIA Reform

An examination of the interaction between the federal and selected provincial governments as it relates to reform in EIA yields important – if diverse – results. While the provinces were united in their opposition to the CEAAct and continued to act together when seeking amendments to this Act, certain aspects in their dealings with the federal government point to interesting distinctions between how the increased federal involvement of the early 1990s affected each jurisdiction respectively. It is therefore beneficial to consider bilateral relations between the federal government and the individual provincial governments separately from the multilateral relations between the federal government and all of its provincial counterparts.

6.2.1 Bilateral Relations

In British Columbia and Alberta – the two provinces with the most prominent upward shifts in stringency – evidence was found of an element of reactivity in provincial reforms. Whether motivated through a desire to avoid overlap or to dissuade possible federal encroachment on provincial jurisdiction, officials located in both provinces saw these reforms as at least partially a response to events at the federal level (Crook, 2004; MacDonald, 2004). In neither province did the provincial official see the federal process as allowing better coverage of relevant issues during an EA (Crook, 2004; North, 2004).

By contrast, in Saskatchewan and Manitoba, where legislative reforms were limited and the level of stringency remained fairly consistent throughout the 1990s, no such evidence was found. Instead, provincial officials in both jurisdictions stressed their generally positive relations with the federal government and provided examples of where federal involvement had assisted the provincial process: through the addition of federal resources to the joint panel review process in Saskatchewan (Lechner, 2004); and through the bilateral strengthening of the CEA process in Manitoba (confidential interview, 2004).

The relationship between intergovernmental interaction and EIA reform in Ontario is not well described by either of the above groups of two. While a committee review of the EIA process was completed in 1991, the legislative changes to the OEAA in 1996 seemed to focus more on achieving a more efficient and timely EIA process than on anything else. Ontario was also the only jurisdiction of the ones chosen for this research not to intervene on Alberta's behalf in *Friends of the Oldman River Society v Canada (Minister of Transport) [1992]*. And yet the provincial officials interviewed proved as concerned - if not more concerned - about overlap and jurisdictional infringement than their provincial counterparts. The latter was even cited as a reason for the delay in finalizing a bilateral agreement (Ireland & Macchione, 2004). As was the case with the two westernmost provinces, the officials interviewed did not see federal involvement as facilitating the EIA process.

One possible explanation for Ontario's uniqueness in this research comes from the advanced nature of its EIA process at the time of the development of the CEAAct and from its lack of conflict with the federal government over natural resources. By 1990, the 1975 OEAA had been in effect for 15 years and yet was still one of the most stringent processes

of those examined. Rather than fearing some form of federal involvement, therefore, it has been suggested that Ontario saw it as a measure that might influence other provinces to raise their EIA standards closer to its own (Winfield, 1994). And in terms of natural resources, Ontario certainly has no parallel to Alberta's battles with the federal government over the National Energy Program. Both these factors may have helped contribute to Ontario's EIA process developing relatively independently of the federal presence which influenced its provincial counterparts. Further research on this topic would be valuable.

The unbreakable link between natural resource development and EIA underscores a fundamental difference between the provincial and federal processes. The provinces, as constitutional owners of natural resources, have EIA processes that must operate as part of what one official described as "…the larger government agenda" (Crook, 2004), where the environmental costs of a project are weighed against its potential economic benefits. Recognition of this permits a better understanding of provincial commitments to sustainable development, legislated timelines for aspects of the EIA process and project-specific terms of reference for an EA that can be adapted to different cases. Advocates of a greater federal role in EIA might argue that economic and political concerns hold undue influence at the provincial level and that statements such as "We like to be there for proponents" (Lechner, 2004) indicate an overemphasis on timing and efficiency. Provincial supporters could, however, respond by arguing that seeking to balance environmental and economic goals is only a recognition of the realities of EIA.

The federal government, by contrast, does not have the same degree of regulatory responsibility for natural resource development. This has contributed to the CEAAct becoming "…more of a pure environmental protection statute" (Crook, 2004) with little

consideration of economic benefits and a consistent checklist-style approach to all projects. It is not, therefore, surprising that environmental groups generally prefer federal involvement, which Harrison (1996) attributes to their perception that the federal government is more removed from the influence of industry. One provincial official, for instance, saw Environment Canada as functioning "…essentially as an advocacy group" in EAs (North, 2004). These underlying differences between the federal and provincial processes will be discussed again following a discussion of multilateral relations.

6.2.2 Multilateral Relations

The net result of the Rafferty-Alameda, Oldman River and James Bay II court decisions was a forced recognition by both orders of government that Ottawa had sufficient jurisdiction over environmental policy to require participation in a wide variety of EAs. This ran counter to the traditional approach of deference discussed above and led for a short period of time to a system where both the federal and provincial EIA processes were used where an EA was required by both orders of government. In this period, the federal government sporadically resisted provincial calls for decentralization of the EIA process – essentially for a return to the *status quo*. Chapter 5 discussed how three successive federal Environment Ministers – de Cotret, Bouchard and Charest – gradually asserted their authority, culminating in Charest's decision to unilaterally order a federal EA of the James Bay II project.

The federal assertion of authority, however, should not be exaggerated. Even as Charest was announcing a federal EA over the James Bay II project, for example, the federal government was arguing alongside Quebec that the JBNQA, which was more stringent in some respects than the EARPGO, did not have the force of law. This attempt

to minimize its role is consistent with the federal position adopted in the cases of the Rafferty-Alameda and Oldman River dams. Even at the peak of public concern, then, the federal government showed ample desire to avoid intergovernmental conflict, which again fuels questions about how significant federal reforms might have been without the court cases. Considering that the harmonization initiative that eventually led to the CWA was initiated in 1993, the period in which Ottawa was prepared to act unilaterally was quite small.

Provincial reaction to the disruptive effects of the heightened federal presence in EIA generally fits well with traditional arguments in favour of decentralization. Increased efficiency and elimination of overlap has already been mentioned in this chapter, but it is worth reinforcing the continued disagreement over to what extent overlap exists. All provincial officials interviewed, however, reported overlap to be a significant problem and the provinces provided several examples of overlap in their recommendations for amendments to the CEAAct during its five-year review (Provincial/Territorial Working Group, 2000). Yet federal officials seemed to see this problem as exaggerated and the federal Standing Committee on Environment and Sustainable Development (House of Commons, 1997) found no evidence of significant overlap in its analysis of the CWA. There seems to be a great deal of truth to Dwivedi and Woodrow's (1989) assertion that the importance of this issue lies largely in the eye of the beholder.

A second, less-prominent provincial concern was over the ability to maintain regional preferences. British Columbia, Saskatchewan and Ontario, for instance, have legislated timelines, whereas Alberta and Manitoba do not. Ontario continues to do EAs on private undertakings only at the Minister's discretion, while Saskatchewan has chosen to

reform its EIA process through policy guidelines as opposed to legislative changes. The development of a national model for EIA had initially been on the CCME's agenda for harmonization, but did not make it to the CWA. Given the still-significant differences between the six respective EIA processes examined, it would have been a complicated task to orchestrate the various amendments to legislation and alterations to policy necessary for a national model. Nor is it clear that constraining Canada's governments into one model of EIA would outweigh the loss of policy experimentation that would result. If a national model had existed in the 1970s, for example, it is questionable whether Ontario could have produced as groundbreaking a process as the 1975 OEAA.

Yet there seems to be merit in the argument presented in Chapter 2 that federal involvement in a policy area ensures some form of national standard. Indeed, such a goal appears to have motivated CEAAgency officials ever since its formation (House of Commons, Oct. 4th 1990; MacDonald, 2004). Recognition of Aboriginal treaty rights and guarantees of Aboriginal involvement, which are only present in the CEAAct and the BCEAA, are explicitly laid out in each of the bilateral agreements, including the draft Canada-Ontario agreement. The uniform integration of these sections into all of the bilateral agreements seems to have been a federal priority. This is also true of the transboundary provisions included in every bilateral agreement, which guarantee that an affected party shall be invited to participate in the EA. And as was discussed in Chapter 5, the transboundary provisions included in the CEAAct are seen by some as a further backstop measure in case certain interests are overlooked by a provincial EA.

The key provincial arguments throughout the 1990s – arguments that would ensure reduction of overlap, allow for regional diversity and protect provincial jurisdiction all at

the same time – were for equivalency agreements and collaborative scoping. The former had been implemented under the *Canadian Environmental Protection Act* and would allow for near-total delegation of responsibility for the EIA process to a province. As the overview of the court cases revealed, however, the provincial processes were deemed not to have fulfilled the requirements of a federal EA. The obvious course of action to take for a province seeking to regain primary responsibility for EAs within its boundaries was to alter its process to fulfill the federal requirements. Indeed, an examination of provincial presentations over the course of the decade – from John Reynolds' appearance before the House of Commons Committee studying Bill C-78 in 1990 to the provincial/territorial recommendations for amendments to the CEAAct in 2000 – revealed a consistent pattern of highlighting provincial reforms and asserting that these reforms deserved recognition in the form of equivalency.

Given the wide discrepancies between the underlying philosophies of the federal and provincial processes - essentially centering around the provincial need to balance environmental protection against its control over natural resource development – the degree of delegation an equivalency agreement would entail seems unwise. Furthermore, the federal process does in some instances offer more stringent criteria than its provincial counterparts, even when compared with the most stringent provincial processes. The requirement that a person or group must be "directly affected" by a proposed project to appeal a decision under the Alberta EPEA places a limitation on public involvement that has no parallel in the CEAAct.

The argument for collaborative scoping, which has persisted along with equivalency as a provincial demand up to the present day, has also been linked to protection of

jurisdiction. This link was perhaps best expressed by the Attorney-General of Saskatchewan during the *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] Supreme Court case when EAs were described as a "constitutional Trojan horse" allowing for federal intrusion into a variety of provincial responsibilities on the basis of fairly limited areas of federal jurisdiction. Indeed, the potential for infringement on provincial jurisdiction was a constant and often a divisive issue throughout the court cases discussed in this research. La Forest J. – who feared that allocation of too much control over the environment to the federal government under the POGG clause could "…effectively gut provincial legislative jurisdiction" (*R v Crown Zellerbach Canada Ltd* [1988]) – later upheld the ability of a federal EA to consider factors within provincial jurisdiction (*Friends of the Oldman River Society v Canada (Minister of Transport)* [1992]). Iacobucci J. further reinforced this ability in the case of *Quebec (Attorney General) v Canada (National Energy Board)* [1994] by stating "…the scope of [the National Energy Board's] inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective."

The respective bilateral agreements take different approaches to this issue. The agreements with Manitoba and Saskatchewan say nothing directly about collaborative scoping; only committing the lead party to providing the necessary information for both governments. Both the 1997 and the draft 2003 bilateral agreements with British Columbia contain a commitment to collaborative scoping. The 1999 bilateral agreement with Alberta, however, calls for the lead party to establish a project advisory review team which develops terms of reference for the EA, including the scope of the assessment. The main concern with such clauses is the potential for the restriction of federal unilateralism in EIA. By

surrendering sole responsibility for determining the scope of federal EAs in at least the cases of the bilateral agreements with British Columbia and Alberta, there is the potential that fewer factors could be examined than if a separate federal assessment process was conducted. This concern is aggravated by the fact that this research did not find one case where a federal Department acted as the lead party in a joint EA under any of the bilateral agreements. Again, this is an area that would benefit from further research.

6.3 Collaboration vs. Competition and Centralization vs. Decentralization

This examination of the development of Canadian EIA policy offers some interesting conclusions relating to the two broad debates presented in Chapter 2. In relation to the first – whether collaboration or competition is desirable in a policy area with such an unclear constitutional division of power - the evidence suggests that it is necessary to distinguish between the two orders of government when considering this question. At the federal level, there is little to no indication that intergovernmental competition provoked EIA reforms. Instead, even at the height of public concern and at a time when the courts were significantly expanding the federal role in EIA, the federal government continued to show signs of reluctance to become more involved. It has been argued that the explanation for this lies partly in the political atmosphere of the time. As Lucas (1986) argues, the federal government often operates according to a "political constitution" where intergovernmental harmony is seen as a premium. After the 1995 referendum, for instance, the Chrétien government was seeking to prove that federalism could work and several authors credit this attitude as partly explaining the federal push for the CWA. One official

described the subsequent bilateral agreements as "…basically sewing up the country from West to East" (Ireland & Macchione, 2004).

At the provincial level, evidence was found that federal actions can lead to positive policy reform in some cases. British Columbia and Alberta passed highly stringent pieces of EIA legislation at least partially in response to events at the federal level. Saskatchewan and Manitoba instituted relatively few reforms. It seems likely that there is an element of provincial capacity at play: that the response of these two 'have' provinces was so much more dramatic because they financially and administratively could afford to take such action. This is in line with Poel's (1976) findings of the importance of socioeconomic factors in explaining differences in interprovincial reforms. By contrast, the two 'have-not' provinces examined provided examples of benefits derived from federal involvement. Such a distinction speaks to another aspect of the federalism literature discussed in Chapter 2, namely that federal involvement allows for some form of equalization of resources across regions. Ontario - the third 'have' province - fits neither of these models but did not have a history of conflict over natural resources and already had a fairly stringent EIA process in place by 1990. This raises a further interesting point, which is that there was no evidence found of interprovincial influence on EIA reforms. That is, there was no indication that the 1975 OEAA influenced any of the other provinces examined to reform their EIA processes.

It is valuable to establish further links between this research and the literature on federalism. Perhaps the most appropriate theory with which to contrast this research is Simeon's (2000) model of collaborative federalism. This model emphasizes non-constitutional reforms and changes through two different means: "…collaboration among federal, provincial and territorial governments, seeking an appropriate balance among their

roles and responsibilities" (p.238); and "…collaboration among the provincial and territorial governments, with Ottawa on the sidelines" (p.238). In relation to the latter, this research did find some evidence of bilateral provincial cooperation on a practical level, but, as mentioned above, found no evidence of interprovincial development of EIA reforms. Thus the findings do not support, for example, the model put forward by Turgeon and Vaillancourt (2002) in relation to the development of highways of national policy being developed interprovincially.

The former means of collaboration is more interesting because it describes almost perfectly the underlying philosophy of the movement towards harmonization of environmental policy in place since the mid-1990s. The CCME stresses the equality between the federal and provincial governments through the development of 'national' – as opposed to 'federal' – strategies while the CWA and its bilateral agreements attempt to more efficiently and effectively delineate federal and provincial roles in EIA. The presence of evidence that unilateral federal action contributed to an increase in the stringency of some provincial EIA processes, however, supports Winfield's (2002) warning of the danger in assuming that greater collaboration automatically leads to better policy outcomes. In terms of EIA policy, therefore, there appears to be merit to Breton's (1985) argument that "competitive federalism" can have positive outcomes.

Such a conclusion for environmental policy is complicated by the fact that the federal government is generally unwilling to engage in intergovernmental competition. Even in the years examined, increased federal involvement in EIA had more to do with court rulings that pushed Ottawa into the field than any federal desire to expand its jurisdiction. Given these conditions, it is questionable whether "competitive federalism" as

seen in a policy area such as health care has ever occurred in environmental policy. Instead, it seems appropriate to conclude that the unilateral federal actions in EIA around 1990 provoked a competitive response on the part of the provinces, but that a two-way competitive dynamic never emerged.

This research also has implications for the second broad debate presented in chapter 2 concerning which level of government is better placed to implement stringent environmental policy and therefore whether centralization or decentralization should be pursued. The evidence leads to two main conclusions. First, there are fundamental differences in the way the federal and provincial governments approach EIA. It is argued that these stem from the constitutional according of natural resources to the provinces. Within the provincial governments, EIA must always take place alongside considerations of natural resource development. The unbreakable link between environmental protection and economic development is not as obvious at the federal level. Both governments therefore offer equally necessary perspectives on EIA: the federal government perhaps more able to focus exclusively on environmental protection and the provincial governments presenting what some would say is a more realistic, integrated approach to sustainable development.

Second, similarly to Nemetz's (1986) conclusion in relation to pollution control, it is argued here that the provincial and federal governments fulfill different functions in environmental assessment policy that the other would struggle to offer. Centralization that restricted the ability for provincial policy experimentation would be detrimental to the development of stringent EIA policies. Innovations such as the 1975 OEAA, the quasi-judicial Alberta Environmental Appeals Board and the independent British Columbia Environmental Assessment Office might not have come to be under too centralized a

system. On the other hand, federal involvement led in some cases to a form of equalization – or what Breton (1985) might call "competitive equality" – between the provincial processes. The EIA processes of the six jurisdictions examined were of much more comparable stringency in 1995 than they had been ten years prior. Within this decade, federal action was found to have played a significant role in provincial reforms of British Columbia and Alberta - those two jurisdictions which still did not have a specific piece of EIA legislation. This ability to ensure some form of national standard is joined by a unique positioning to ensure the consideration of transboundary concerns and a constitutional responsibility for 'Indians and Indian lands' as examples of "…problems [the federal government] alone can resolve and is constitutionally responsible for resolving" (Breton, 1985, p.493). Possible limitations on the federal government's ability to act unilaterally in EIA for the sake of furthering collaboration should be considered with these points in mind.

It therefore seems logical that both collaboration and some form of competition have a place in a Canadian federation that must achieve a balance between centralization and decentralization in EIA policy. Neither should be sought simply as an end in itself. This does not mean that there should be a perpetual state of war between the two orders of government, but that some degree of conflict and overlap should not automatically be regarded as a bad thing. As concluded by the Macdonald Commission, they are, rather, "…necessary consequence[s] of federalism" (Royal Commission on the Economic Union and Development Prospects for Canada, vol.1, p.68) that must be weighed against the possible benefits to be derived. This is an important point that deserves greater recognition, especially in light of the previously discussed difference in the underlying philosophies of

the federal and provincial EIA processes. It seems far worse that there be 'underlap' in these processes than overlap.

These conclusions suggest that the ability of the federal government to unilaterally intervene into EIA – or even the ability of the federal government to threaten unilateral action – is an important one. Just as the provinces are better positioned to represent regional preferences and to weigh the environmental, economic and social costs and benefits of a project, so too the federal government is better positioned to use its policies and resources to ensure some form of national standard that provinces may exceed if they desire to or are able. This should not be seen as a call for significant centralization; it is merely an argument that the federal government be wary of agreements that may surrender its existing power or bind its ability to act unilaterally if necessary.

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